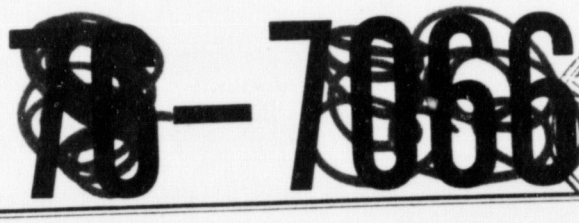
United States Court of Appeals

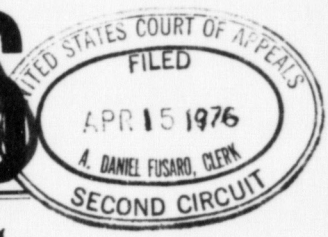
for the Second Circuit

APPENDIX

75-7465

ORIGINAL





United States Court of Appeals

For the Second Circuit.

JOSE FERNANDEZ, *Plaintiff,*

against

CHIOS SHIPPING CO., LTD., *Defendant and Third-Party Plaintiff-Appellee,*

against

MAHER STEVEDORING COMPANY, INC., and STATES MARINE LINES, INC., *Third-Party Defendants-Appellants.*

CHIOS SHIPPING CO., LTD., *Fourth-Party Plaintiff-Appellee,*

against

CASTLE & COOK, INC., DOLE CORP. and CASTLE & COOK FOODS CORPORATION, *Fourth-Party Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

MCHUGH, HECKMAN, SMITH & LEONARD
Attorneys for Third-Party Defendant-Appellant Maher Stevedoring Company, Inc.
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New York, N. Y. 10005

BOAL, DOTI & LARSEN
Attorneys for Third-Party Defendant-Appellant States Marine Lines, Inc.
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New York, N. Y. 10006

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1976

(8762)

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Lantelme, Peter:

E.B.T. 411a

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- -X

JOSE FERNANDEZ,

Plaintiff,

-against-

CHIOS SHIPPING CO. LTD.,

Defendant and Third-Party Plaintiff-Appellee,

-against-

MAHER STEVEDORING COMPANY, INC. and STATES MARINE LINES, INC.,

Third-Party Defendants-Appellants.

- -X

CHIOS SHIPPING CO. LTD.,

Fourth-Party Plaintiff-Appellee,

-against-

CASTLE & COOK, INC., DOLE CORP. and CASTLE & COOK FOODS CORPORATION,

Fourth-Party Defendants-Appellants.

- -X

DOCKET ENTRIES.

JOE

DOCKET ENTRIES

(PAGE # 2) JUDGE MOTLEY 71 Civ. 3

DATE	PROCEEDINGS	
Jun23-71	Filed Complaint. Issued Summons.	
1 5-72	Filed letter authorizing the Clerk to act as agent in accepting service as provided in Rule 4 FRCP for Edward T. Molinaro, 100 Seventh Ave.,Carbondale,Pa. and Anthony P. Catanzaro, 31 Summit Ave. Carbondale,Pa.	
ug 18 72	Filed Summons & entered Marshal's return --Served deft 6-29-72. (States Marine Isthmian Agency Inc.)	
ug 18 72	Filed Additional Summons & entered Marshal's return -Served Maritime Brokers Inc. 8-10-72.	
03 22 72	Filed Certificate of Mailing summons and complaint by Registered Mail, return receipt requested. - Addressed to Chios Shipping Co. Ltd. c/o S. Livanos, Shipbrokers, LTD. Trent House 55/57 St. Mary Axe London, E.C. 3, England. Receipt #301162	
Oct. 1-73	Filed memo endorsed on pltff's complaint filed 6-23-71: Deft. is directed to file no later than 10-10-73 an answer to the within complaint. All pre-trial discovery in this case must be completed by 12-21-73. If any third parties are to be brought in by the deft., such actions must be commenced with ten days from their date i,e. 10-10-73. On 12-24-73, pltff. is directed to file a note of issue and on 1-2-74 the parties are to report to Magistrate Jacobs for assignment to a magistrate who will attempt to settle the case, and if no settlement, supervise pre-trial memoranda submission and submission of proposed pre-trial orders pursuant to a scheduled determined by the mahistrate. So ordered-MOTLEY, J. m/n	
Oct. 4-73	Filed Motion by deft : who moves for leave as a third party pltff to be caused to be served upon Maher Stevedoring Co. In and States Marine Lines , Inc. a summons and and third party complaint.	
Oct. 10-73	Filed complaint of deft. and third-pty pltff. Chios Shipping Co., Ltd. (sued as Chios Shipping Company, Ltd.) against third-pty deft. States Marine Lines, Inc.	
Oct. 10-73	Filed complaint of deft. & third-pty pltff. Chios Shipping Co., Ltd. (sued as Chios Shipping Company, Ltd. against third-pty deft. Maher Stevedoring Company, Inc.	
Oct.12-73	Filed ANSWER to complaint	Z.P.S.
Oct.12-73	Filed deft. and third-pty pltff Chios Shipping Company, Ltd's notice of oral & physical examination of pltff. before trial on 11-9-73.	
Nov. 8-73	Filed third-pty deft. Maher Stevedoring Co., Inc's demand for a jury trial.	
Nov. 8-73	Filed ANSWER of third-pty deft. Maher Stevedoring Co., Inc.	MHS&L
Nov. 8-73	Filed ANSWER of third-pty deft. Maher Stevedoring Co., Inc. to third-pty complaint.	
Nov. 8-73	Filed third-pty deft. Maher Stevedoring Co., Inc's interrogs to the deft. and third-pty pltff.	
Nov. 8-73	Filed third-pty deft. Maher Stevedoring Co. Inc's interogs. to pltff.	
Nov. 8-73	Filed third-pty deft. Maher Stevedoring Co., Inc's notice of taking deposition of deft. and third-pty pltff. on 12-27-73.	
Nov. 14-73	Filed deft. and third-pty pltff. Chios Shipping Co., Ltd.As notice of taking deposition of third-pty deft. Maher Stevedoring Co. on 12-27-73	
Nov 20-73	Filed summons & marshals return - Served Maher Stevedoring Co. 10-13-73 & 10-17-73 & States Marine Lines 11-9-73.	
Dec. 6-73	Filed ANSWER of 3rd-pty deft. States Marine International, Inc. sued herein as States Marine Lines, Inc. to third-pty complaint.	HD&L
March 29-74	Filed deft. & third-pty pltff. 's notice of taking deposition of third-pty deft. States Marine Lines, Inc. on 4-11-74.	
July 10-74	Filed answer of third-pty deft. Maher Stevedoring Co., Inc. to cross-claim of co-third-pty deft., States Marine International , Inc. and Cross-Claim	
Aug. 16-74	Filed Fourth-Party complaint and issued summons.	

(CONT'D ON PAGE # 3)

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS	AMO REPORT EMOLU RETI
Aug. 23-74	Filed Fourth -pty summons and return-served: Castle & Cook, Inc. by Claude E. Wollon on 8-20-74	
Aug. 23-74	Filed fourth-pty summons and return- served Castle & Cook, Inc. by Claude E. Wollon on 8-20-74	
Aug. 23-74	Filed fourth-pty summons and return-served: Castle & Cook Food Corp. by Claude E. Wollon on 8-20-74.	
Aug. 26-74	Filed deft. and third-pty. pltff's interrogs. to third-pty defts.	
Sep. 5-74	Filed deft & third-pty pltff's notice of taking deposition of Maher Warehouse Corp., etc. by Don Ancillai, on 9-24-74.	
Sep16-74	Filed ANSWER of third pty pltff Chios Shipping Company, Ltd. to the counterclaims of Maher Stevedoring Company, Inc. - (prC&B)	
Oct. 4-74	Filed ANSWER of fourth-pty defts. to the fourth-pty complaint.	WSC&F
Oct. 29-74	Filed third-pty deft. Maher Stevedoring Co., Inc. answers to interrogs. deemed to be continuing up to and including the time of trial.	
Nov. 25-74	Filed deft, third-pty pltff and 4th-pty pltff. Chios Shipping, sued as Chios Shipping Co., Ltd. ANSWER to counterclaims of 4th-pty defts., Castle & Cook, Inc, Dole, a division of Castle & Cook, incorrectly sued herein as Dole Corp. and Castle & Cook Foods, a division of Castle & Cook Corp. and Castle & Cook Foods Corp.	ZPRC&B
Nov. 25-74	Filed deft., third-pty pltff and fourth-pty pltff. Chios Shipping Co., Ltd.'s interrogs. to 4th-pty deft. Castle & Cook Inc. and Dole, a subdivision of Castle & Cook Inc. incorrectly sued as set forth in the above capt ion.	
NOV 25-74	PRE-TRIAL CONFERENCE HELD BY JACOBS, M.S.MAG.	
Jan. 7-75	Filed pre-trial memorandum of 3rd-pty deft. Isco, Inc. formerly States Marine Lines, Inc	
Jan. 13-75	Filed pre-trial memorandum of deft. & third-pty pltff and fourth party pltff. Chios Shipping Cp. Ltd., incorrectly sued as Chios Shipping Co. Ltd.	
Jan. 15-75	Filed deft. Maher Stevedoring Co., Inc. pre-trial memorandum.	
[illegible] 13-75	Filed third-pty deft. Isco, Inc., formerly States Marine Lines, Inc. answers to deft. & third-pty pltff's interrogs.	
[illegible] 18-75	Filed pre-trial memorandum of fourth-pty defts.	
[illegible] 14-75	Filed third-pty pltff.'s answers to third-pty deft. Maher Stevedoring Co. In interrogs.	
March 18-75	Filed Order- this case previously scheduled for pre-trial on 3-17-75 has been re-scheduled for 6-2-75 as indicated. So ordered- MOTLEY, J. (m/n	
[illegible] 1-75	Filed consent Jury pre-trial order. So ordered- MOTLEY, J.	
[illegible] 21-75	Filed affdvt.& order to show cause by ~~xxxx~~deft & 3rd pty.pltff and 4th pty pltf to let 4th pty defts Castle & Cook Inc. and Dole for order striking the answer to 4th pty complaint.etc. Ret. 5-29-75 9:30a.m. before Mag.Jacobs Rm.1602	

(CONT'D — PAGE # 4)

DOCKET ENTRIES

DATE	PROCEEDINGS	AMOUNT REPORTED IN ENDORSEMENT RETURNS
June 2-75	Before MOTLEY, J. Jury trial begun.	
June 3-75	trial cont'd	
June 4-75	trial cont'd	
June 5-75	trial con't'd. Jury verdict for pltff. in the amount of $90,200. trial continues as to third and fourth pty. defts.	
June 6-75	trial cont'd as to 3rd. & 4th pty defts. Jury returned with a verdict against Maher Stevedoring Co., Inc., Castle & Cook, Inc. and Castle & Cook Foods Corp. and Dole Corp.	
June 17-75	Filed deft. Chios affdvt. and notice of motion for an order granting direct verdict and Judgment notwithstanding the verdict re: pltff's future damages. Ret. 6-27-75	
June 27-75	Filed pltff's affdvt. of Robert Klonsky in response to pro forma motion by Chios deft. & third-pty pltff to set the verdict aside.	
Jul 2-75	Filed fourth-pty deft's Castle & Cook affdvt. and notice of cross-motion for an order to direct verdict and judgment notwithstanding the verdict re: pltff's future damages. Ret. 7-2-75	
July 02-75	Filed Third-Party-Deft. Maher Stevedoring Co.,Inc. Affvdt and Notice of Motion for an order for a directed verdict and for judgment n.o.v. & for entry of judgment consistent with the answers to interrogs. Ret. 07-15-75.	
July 02-75	Filed Third-Party deft Maher in support of motion for directed verdict judgment n.o.v. and for entry of judgment consistent with jury's answers to interrogs.	
7-11-75	**FiladDeft Third-Party & Fourth-Party Pltff(CHIOS)Affidavit in reply to pltff's affidavit in opposition to the motion of Chios Shipping Co.;Ltd.under F.R.C.P. 50(a) directed verdict and 50(b) judgment notwithstanding the verdict for past & future pain & suffering & future loss of wages. by Edwin K. Reid.**	
7-9-75	Filed Judgment # 75,594--ordered that pltff. Jose Fernandez have judgment against deft. Chios Shipping Co., Ltd. in the amount of $90,200. and the third-pty acti to be decided on motion by the Court. MOTLEY,J . Judgment entered- 7-8-75. Cle	
7-[illegible]-75	Filed deft. Chios Shipping Co., Ltd. affdvt. of Edwin K. Reid in reply to third-pty deft. Maher's motion for a directed verdict.	
7-[illegible]-75	Filed deft. Chios Shipping Co. Ltd's affdvt. of Edwin K. Reid in reply to fourth-pty deft. Castle's motion for a directed verdict.	
7-[illegible]-75	Filed deft. and third-pty pltff. and fourth-pty pltff. Chios Shipping Co., Ltd., notice of appeal from judgment entered against it in favor of pltff. entered on 7-8-75. Copies to: DiConsanze, Klonsky & Cutrona; Boal, Doti & Parsons McHugh, Heckman, Smith & Leonard and Wynne, Spuracio, Capriano & Trentalange. Ret. 8-6-75	

DOCKET ENTRIES

DATE	PROCEEDINGS
08-11-75	Filed Memo Endorsed on motion filed 06-17-75.....Defts, third party defts and fourth party defts have filed motions for directed verdicts and for judgment notwithstanding the verdicts rendered by the jury on 06-06-75. Those motions are hereby denied, etc. So Ordered. MOTLEY, J
08-11-75	Filed Order that above defts motions are hereby denied. So Ordered. MOTLEY, J.
	Filed transcript of record of proceedings, dated June 3 & 4, 1975.
	Filed transcript of record of proceedings, dated
01015-76	Filed Memorandum-Opinion # 43729-- for the reasons stated, the court holds that Isco (third-pty deft. States Marines Lines, Inc.- referred to herein by its present name, "Isco, Inc") is bound to indemnify Chios (deft. & third-pty pltff) from its liability to pltff, including costs and attys' fees, etc. Chios is entitled to judgment against Maher (3rd-pty deft) also. Finally, Chios may recover against Castle & Cook (4th-pty defts) upon the jury's findings-- Isco is entitled to recover, in turn, on its cross-claims for indemnification from Maher and Castle & Cook, etc.-- the preceding discussion of Isco's liability to Chios disposes of Isco's counterclaim against Chios, thus, Maher's counterclaim against Chios etc, must fail. There are two reasons why Maher's cross-claim against Isco, etc. must fail... Maher is not entitled to a total indemnity on its cross-claim against Castle & Cook.. Castle & Cook is not entitled to indemnity from any party, etc., although it will be jointlt liable with Maher for the amount of the judgment, etc.. its cross-claim against Isco is without evidentiary foundation. Finally, Castle & Cook filed a counterclaim against Chios, etc.. these allegations may be briefly disposed of, etc... Judgment is accordingly entered simultaneously herewith. MOTLEY, J. (m/n)
Jan16-76	Filed Order & Judgment # 76,048-- that deft. & third & 4th pty pltff. Chios Shipping Co., Ltd. (Chios) recover from 3rd-pty deft. Maher Stevedoring Co., (Maher) and Isco, Inc. (Isco)(formerly States Marine Lines, Inc.) and 4th-pty defts. Castle & Cook, Inc., Dole Corp. and Castle & Cook Foods Corp (Castle) jointly and severally, the sum of $90,200.00 with all interest and costs taxed in favor of pltff. against Chios, together with counsel fees and expenses incurred by Chios in defending the pltff s claim-- that 3rd-pty deft. Isco recover upon its cross-claims against 3rd-pty deft. Maher and 4th-pty deft. Castle for any portion of the deft. and 3rd and 4th pty pltff Chios' recovery herein directed or awarded that is paid by 3rd-pty deft. Isco, together with interest from the date of such payment and, counsel fees and expenses incurred by the said Isco in defending the pltff s and third-pty pltff's claims. So ordered- MOTLEY, J. Judgment entered- 1-19-76 Clerk (m/n)
27-76	Filed Order of discontinuance- MOTLEY, J.
2-19-76	Filed third-pty deft. Maher Stevedoring Co., Inc. notice of appeal to USCA from each and every part of the judgment enetred against it on the 1-9-76. Copies mailed to: DiCostanzo, Klonsky & Cutrona- Boal, Doti & Larsen- Wynne, Sparacio, Capriano & Trantalange and Zock, Petri, Reid, Curtin & Byrnes. Entered- 02-18-76
2-18-76	Filed undertaking for costs on appeal in the sum of $250.00- National Surety Corp.
02-18-76	Filed third-pty deft. States Marine Lines, Inc. (now Isco Inc) notice of appeal to USCA from the judgment entered against it on 1-19-76. Copies mailed to: DiCostanzo, Klonsky & Cutrona- Zock, Petrie, Reid, Curtin & Byrnes- Mellugh Beckman, Smith & Leonard and Wynne, Sparacio, Capriano and Trantalange. Entered 02-18-76

(CONT'D — PG #6 — OTHER SIDE)

DOCKET ENTRIES

DATE	PROCEEDINGS
02-18-76	Filed fourth -pty defts. notice of appeal to the USCA from the judgment and each & every part thereof entered on 1-19-76. Copies mailed to: DiCostanzo, Klonsky & Cutrona- Zock Petrie Reid & Curtin- McHugh, Beckman, Smith & Leonard and Boal, Doti & Larsen. Entered 2-18-76
02-18-76	Filed deft. & third-pty pltff and fourth pty pltff. Chios Shipping Co., Ltd. notice of appeal to USCA from the interlocutory adjudication entered on 7-8-75 finali the entry of judgment on 1-19-76. Copies mailed to: DiCostanzo, Klonsky & Boal, Doti & Larsen- McHugh Beckman Smith & Leonard- Wynne Sparacio Caprian and Trentalanage. Ent. 2-18-76

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

JUDGMENT APPEALED FROM.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JOSE FERNANDEZ,

Plaintiff,

-against-

CHIOS SHIPPING CO., Ltd.,

Defendant and Third-Party Plaintiff,

-against-

MAHER STEVEDORING COMPANY, INC. and STATES MARINE LINES, INC.,

Third-Party Defendants.

- -

CHIOS SHIPPING CO., Ltd.,

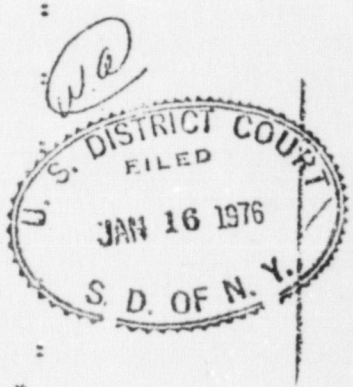
Fourth-Party Plaintiff,

-against-

CASTLE & COOK, INC., DOLE CORP. and CASTLE & COOK FOODS CORPORATION,

Fourth-Party Defendants.

- x



71 CIV.2786

JUDGMENT APPEALED FROM

ORDER Judgment
71,048

The issues in the above-entitled action having been brought on regularly for trial before this court and a jury, and the court having instructed the jury to make answer to certain interrogatories, and the jury having duly made answer to said interrogatories, it is

ORDERED, ADJUDGED and DECREED that defendant and third and fourth-party plaintiff Chios Shipping Co., Ltd., (Chios) recover from third-party defendant Maher Stevedoring Company, Inc. (Maher) and Isco, Inc. (Isco) (formerly States Marine Lines, Inc.) and fourth-party defendants Castle & Cook, Inc., Dole Corp., and Castle & Cook Foods Corporation, (Castle), jointly and severally, the sum of $90,200.00, with all interest and costs taxed in favor of plaintiff against Chios, together with counsel fees and expenses incurred by Chios in defending the plaintiff's claim. It is further

ORDERED, ADJUDGED and DECREED that third-party defendant Isco recover upon its cross-claims against third-party defendant Maher and fourth-party defendant Castle for

JUDGMENT APPEALED FROM

any portion of the defendant and third and fourth-party plaintiff Chios' recovery herein directed or awarded that is paid by third-party defendant Isco, together with interest from the date of such payment and counsel fees and expenses incurred by the said Isco in defending the plaintiff's and third-party plaintiff's claims.

Dated: New York, New York

January 15, 1976

SO ORDERED

Constance Baker Motley

CONSTANCE BAKER MOTLEY
U. S. D. J.

JUDGMENT ENTERED - 1/19/76
Raymond F. Burghardt
CLERK

MEMORANDUM OPINION BY MOTLEY, D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE FERNANDEZ,

Plaintiff,

-against-

CHIOS SHIPPING CO., Ltd.,

Defendant and Third-Party Plaintiff,

-against-

MAHER STEVEDORING COMPANY, INC. and STATES MARINE LINES, INC.,

Third-Party Defendants.

CHIOS SHIPPING CO., Ltd.,

Fourth-Party Plaintiff,

-against-

CASTLE & COOK, INC., DOLE CORP. and CASTLE & COOK FOODS CORPORATION,

Fourth-Party Defendants.

71 CIV. 2786

#43729

APPEARANCES

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MEMORANDUM OPINION BY MOTLEY, D.J.

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States Marine Lines, Inc.

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99 John Street
New York, New York 10038

Attorneys for Fourth-Party Defendants

CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION BY MOTLEY, D.J.

Plaintiff Jose Fernandez was a longshoreman employed as a holdman by third-party defendant Maher Stevedoring, Inc. ("Maher"). On September 1, 1968, he was injured aboard the SS CHIOS, owned by defendant and third-party plaintiff Chios Shipping Company Ltd. ("Chios"), as he was assisting in the unloading of a cargo of pre-palletized cartons of pineapple at Port Newark, New Jersey. The cartons of pineapple had been prepared and shipped by the fourth party defendants Castle & Cook, Inc., Dole Corp., and Castle and Cook Foods Corporation ("Castle & Cook"). At the time of injury, the SS CHIOS was time chartered to third-party defendant States Marine Lines, Inc. (referred to herein by its present name, "Isco, Inc.").

This case was tried before a jury on June 2, 3, 4, 5, and 6, 1975. In answer to special questions, the jury found on June 5 that the SS CHIOS was unseaworthy, that such unseaworthiness was the proximate cause of plaintiff's injuries, that plaintiff was not contributorily negligent, and that plaintiff was entitled to damages amounting to $90,200. Judgment in favor of the plaintiff against the defendant Chios was entered on July 8, 1975.

On June 6, 1975, additional questions were submitted to the jury to resolve the various third-party and fourth-party

claims for indemnity. These questions and the jury's responses are set forth below:

"1. Have the parties claiming indemnity against Maher Stevedoring Co., Inc., sustained their burden of proving that the stevedoring company which unloaded the pallets breached its warranty of workmanlike performance by failing to properly supervise and direct its employees with respect to the unloading operation and to provide for the safety of its employees?

YES (X)
NO _____

2. Have the parties claiming indeminity against Maher sustained their burden of proving that the stevedoring company in unloading the pallets breached its warranty of workmanlike performance by improperly loading the pallet in question on to the forklift?

YES _____
NO (X)

3. Have the parties claiming indemnity against Maher sustained their burden of proving that the stevedoring company breached its warranty of workmanlike performance by failing to comply with the applicable Safety Regulation with respect to unloading by pallet?

YES _____
NO (X)

4. If the answer to any of Questions 1, 2, or 3 is Yes, have these parties sustained their burden of proving that the stevedore's action was a proximate cause of plaintiff's injuries?

YES (X)
NO ____

5. If you find that the stevedore breached its duty in any of the respects discussed in Questions 1, 2, or 3, do you find that the Captain or any member of the ship's crew knew or should have known of the condition?

YES ____
NO (X)

6. If the answer to Question 5 is Yes, do you find that the ship's agents acquiesced in the longshoremen working under such condition?

YES ____
NO ____

7. If you find that the answer to Questions 5 and 6 is Yes, do you find that the ship's agents' failure to remedy the condition so outweighed the breach of the stevedore's duty so as to preclude indemnity from the stevedore?

YES ____
NO ____

8. Have the parties claiming indemnity against the Castle Cook-Dole Group sustained their burden of proving that the pre-palletized pineapple unit which broke apart on being lifted was the result of negligence on the part of the Castle Cook-Dole Group?

YES (X)
NO ____

9. Have the parties claiming indemnity against the Castle Cook-Dole Group sustained their burden of proving that the pineapple unit which broke apart was the result of a latent or hidden defect in the pallet?

YES (X)
NO ____

10. If the answer to either Question 8 or 9 is Yes, have the parties sustained their burden of proving that the Castle Cook-Dole Group's actions were a proximate cause of plaintiff's injuries?

YES (X)
NO ____"

Inasmuch as Chios, Maher, Isco, and Castle & Cook all seek indemnity from each other, their claims will be separately considered.

Liability of the third party defendant charterer, Isco, to the third-party plaintiff shipowner, Chios, is predicated upon clause 8 of the time charter agreement. That clause

provides, in relevant part, that "[c]harterers are to load, stow, and trim and discharge the cargo at their expense under the supervision of the Captain. . . ." On this basis, "Chios claims a right over against [Isco] for any liability to plaintiff arising out of breach of the aforesaid charter party upon a finding, if any, of its failure to properly load, stow, and discharge the palletized packages of pineapple." 1/

While the basis of the liability asserted by Chios here is not entirely clear, it is referred to in the pre-trial order as "breach of charter party," 2/ and appears to be a species of liability without fault on the part of the charterer, in the nature of a warranty of safe and proper performance of the cargo operations. The court agrees that the charterer should indemnify Chios on this basis.

Both in argument and in memoranda, Chios relies heavily on two cases from this Circuit which have dealt with the respective liabilities of charterer and ship owner for cargo damage which occurred aboard ships operating under time charter.

In Nichimen Company v. M. V. Farland, 462 F.2d 319 (2d Cir. 1972), Chief Judge Friendly had occasion to construe a virtually identical clause in a time charter agreement to determine whether a ship owner or charterer would be held liable for

cargo damage which occurred due to negligent stowage by a cargo "specialist" who had been hired by the charterer's port agent in Japan. In the circumstances of that case, Judge Friendly held that, under the time charter clause cited above, "[t]he charterer's prime responsibility for loading and stowage is not destroyed by the qualification that this shall be 'under the supervision of the Captain,' a phrase doubtless intended to make plain the master's right to veto a plan that might imperil the seaworthiness of the vessel. . . .not to impose on him a duty, as the owner's agent, to supervise the charterer's stow." 462 F.2d at 332. Thus, the supervisory authority contractually retained by the Captain was held not to be a bar to indemnification by the charterer for cargo damage incident to stowage.

Judge Friendly then touched on the question of negligence in a manner which makes the precedential value of that case to the facts at bar somewhat problematical. "Had the stowage in this case been properly designed by the charterer's agent, no damage would have occurred. The primary negligence was of the charterer's agent, and we can discern no valid reason why the charterer should now be allowed to shift the cargo damage to the owner on the theory that the Captain, on behalf of the

owner, should have corrected its improper stowage. Rather, under clause 8, the safety of the stowage, insofar as cargo damage is concerned, generally is the primary responsibility of the charterer." (462 F.2d at 332.) (footnote and citation omitted).

It is not entirely clear to what extent, if any, the ship owner's right to indemnification was dependent upon some showing of negligence - either direct or imputed - on the part of the charterer. While Judge Friendly spoke of the "primary negligence" of "the charterer's agent," the opinion revealed no evidence of direct negligence by the port agent; rather, the negligence in the case appears to be that of the stowage "specialist" hired by the port agent. As a matter of agency law, it seems entirely possible that the "specialist" might be deemed an "independent contractor", whose negligence might or might not be imputed to his employer,[3/] although that issue was not discussed in the opinion.

It may be that the finding of negligence on the part of the charterer's agent, therefore, is dependent upon the Court's holding that the duty of care imposed upon the charterer by § 3(2) of the Carriage of Goods by Sea Act (COGSA)[4/] is non-delegable, 462 F.2d at 330, and that the charterer is, in effect,

vicariously liable under COGSA for the negligence of even independent contractors which it hires. If that were the crux of the Court of Appeals' reasoning, then the charterer's liability for indemnification would be confined to cargo damage cases governed by COGSA, absent some showing of either direct negligence by the charterer, or negligence imputable to him under the law of agency.

Such a reading of Nichimen finds some support in Demsey & Associates, Inc. v. S.S. Sea Star, 461 F.2d 1009 (2d Cir. 1972), another Second Circuit case decided almost contemporaneously with Nichimen, but by another panel of the Court of Appeals. That case also involved, inter alia, the respective liabilities of ship owner and time charterer for cargo damage due to improper stowage and discharge. Demsey was also a COGSA case in which the charterer was found responsible for stowage of goods, both by statute (46 U.S.C. § 1303(2)) and by the terms of the standard time charter agreement.

The Court of Appeals affirmed the finding of the District Court that the time charterer had breached its duty to load and stow the goods, apparently because the stowage was deemed negligent, 461 F.2d at 1016, and granted the ship owner indemnity from the charterer in the amount of the cargo damage. Again, it is not entirely clear whether the finding of the

MEMORANDUM OPINION BY MOTLEY, D.J.

charterer's negligence was dependent upon the fact that the charterer's agent designed the stowage plan, Demsey & Associates, Inc. v. S.S. Sea Star, 321 F.Supp. 663, 667 (S.D.N.Y. 1970), or whether it was vicarious — predicated upon the negligence of the stevedore (hired by the charterer) in carrying out the stowage operation, [5/] irrespective of any direct negligence by the charterer.

It is possible to read both Nichimen and Demsey to stand for the narrow proposition that, in cases of cargo damage, the ship owner is entitled to indemnity from the time charterer only upon a showing that either the direct or statutorily imputed negligence or other fault of the charterer caused the damage, as discussed supra. However, such a restricted reading seems unjustified.

What seems more likely is that, as between the ship owner and the charterer, clause 8 of the time charter agreement shifts responsibility for loading, stowage, trimming, and discharge of cargo to the charterer, and the charterer must indemnify the ship owner for cargo damage which results from any improper performance of any of the stipulated cargo operations. In this view, the duty to perform the cargo operations carries with it an absolute obligation to indemnify the owner for any such damage, irrespective of any "fault" on the part of the

...rer, and irrespective of the relationship, under agency ... between the charterer and the party which it employs to carry out its duties under the time charter agreement.

The court is persuaded that the latter is the correct view. As Judge Friendly said in Nichimen, ". . . to some extent clause 8 [of the time charter agreement] shifts responsibility for stowage to the charterer; the difficult question is how far." 462 F.2d at 331. The comment applies as well to the responsibility for discharge. As between the shipowner and the charterer, it seems both a reasonable and fair construction of this clause to require indemnity from the charterer for cargo damage, as discussed above. Since the charterer is "primarily responsible" for stowage and discharge, and since the ship captain's supervisory role is reduced to that of vetoing any plan which would imperil the seaworthiness of the ship, it would seem unfair to later predicate indemnity only upon a direct showing of negligence by the charterer (who would, presumably, hire a reputable stevedore to do the loading or discharge), or to allow the charterer to argue that it should not be held liable for the negligence of the stevedore, because the stevedore might be technically an independent contractor under the laws of the agency.

Both Nichimen and Demsey were, of course, cargo damage cases, not ...sonal injury cases, and the charterer here

MEMORANDUM OPINION BY MOTLEY, D.J.

...ously urges that its liability to indemnify the ship owner not be extended to such cases, absent some showing of direct or imputable negligence or other fault on its part. In support of its position, Isco cites several cases, all of which ante-dated Nichimen and Pemsey, and only a few of which dealt with the effect of clause 8 of the time charter agreement in the context of possible liability for a longshoreman's injuries.

Bergan v. International Freighting Corp., et ano., 254 F.2d 231 (2d Cir. 1958) involved a direct suit by an injured seaman against a time charterer under the Jones Act, and merely held that plaintiff was not an "employee" of the defendant charterer, as required for his recovery. There was no discussion of the effect, if any, of clause 8 of the time charter agreement in that case. Neither was there any such discussion in Guzman v. Pichirilo, 369 U.S. 698, 82 S.Ct. 1095, 8 L.ed.2d 205 (1962).

Saridis v. S.S. Paramarina, et al., 216 F.Supp. 794 (E.D. Va, 1962); Wyche v. Egon Oldendorff and States Marine Lines, Inc., et ano., 1967 A.M.C. 2062 (E.D. Va. 1967); and Marino v. Booth Steamship Company, Ltd., an apparently unreported opinion of endorsement filed on October 28, 1968 by Judge Ryan of this Court, were all suits brought directly against time

MEMORANDUM OPINION BY MOTLEY, D.J.

injuries by longshoremen or seamen on theories of negligence or unseaworthiness.

In the court's view, these cases are inapposite here for two reasons. In the first place, to the extent that they considered the effect of clause 8 of the time charter agreement on the issue of loading and stowage, they held that it did not relieve the ship owner of the responsibility for doing the actual loading and stowage. Wyche, supra, at 2063; Marino, supra, at 3. This reading has not survived Nichimen and Pemsey. Secondly, none of these cases considered the specific question whether, if recovery be had against the ship owner, he is entitled to indemnity from the charterer on the theory that it breached its obligations under the time charter agreement.

The only case cited by the charterer here which specifically considered that question is Mondella v. S.S. Elie V, et al., 223 F.Supp. 390 (S.D.N.Y. 1963), in which the ship owner, sued by a longshoreman for injuries sustained during cargo discharge operations, sought indemnification from the time charterer, on the theory that the charterer agreed to perform all stevedoring operations aboard the vessel "and by law impliedly warranted the proper performance of the stevedoring operations." The owner also argued that control of the relevant parts of the ship had been turned over to the charterer in connection with the

stevedoring operations, and that any injuries were due to negligence or unseaworthiness created by the charterer or its agents, servants, or employees. 223 F.Supp. at 391.

In the view of this court, the Mondella case, in denying the ship owner indemnity, no longer correctly represents the law of this Circuit. Mondella held that "[n]one of the provisions of the time charter. . .are at variance with the principles that are usually applicable between time charterer and shipowner." Specifically, the court held that "[t]he loading and discharge of cargo is. . .the shipowner's responsibility. . .and the responsibility does not shift simply because the time charterer may appoint the stevedore." 223 F.Supp. at 392. Construing clause 8 of the time charter agreement, the court said that "[t]his paragraph does not. . . shift the responsibility for stevedoring operations, or the control of the ship or any portion thereof, to [the time charterer]. Indeed, it expressly provides that cargo operations are to be under the Captain's supervision. [The charterer's] agreement to pay for the cargo operations does not make it responsible for the conduct of those operations." Id.

It seems clear to this court that, as construed by the Court of Appeals in Nichimen, clause 8 shifts primary

responsibility for the active control of cargo operations to the charterer and, thus, that the basic assumption on which Mondella denied indemnity is no longer valid. Moreover, where, as in this case, the finding of unseaworthiness against the shipowner is, in fact, predicated upon unsafe conditions created by stevedore and shipper 7/ rather than upon any conditions created by the ship owner, there seems to be no basis in equity for denying indemnity from the charterer, when the ship's captain retained such limited responsibility for cargo operations under the charter agreement.

Accordingly, the court holds that Isco is bound to indemnify Chios from its liability to plaintiff, including costs and attorneys' fees, since Isco impliedly warranted in clause 8 that it would safely and properly carry out all stevedoring operations.

Since the jury also found that the stevedore breached its warranty of workmanlike performance, and since that warranty ran in favor of the ship owner, Demsey & Associates, Inc. v. S.S. Sea Star, 461 F.2d 1009, 1017 (2d Cir. 1972), Chios is entitled to judgment against Maher also. Finally, Chios may recover against Castle & Cook upon the jury's findings.

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In the circumstances of this case, Isco is entitled to recover, in turn, on its cross-claims for indemnification from Maher and Castle & Cook, in accordance with the jury's answers. There was clearly no evidence of conduct by Isco such as to preclude recovery.

The preceding discussion of Isco's liability to Chios disposes of Isco's counterclaim against Chios, in which it asserts that it was the ship owner who was ultimately responsible for cargo operations and supervision of the stevedores. In fact, the time charter agreement shifted that primary responsibility to the charterer.

Maher's contention that Chios was guilty of conduct sufficient to preclude indemnity finds no support in the evidence sufficient to meet the test in this Circuit, i.e., that the ship owner's fault "must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough." Albanese v. N.V. Nederl. Amerik Stoomv. Maats., 346 F.2d 481, 484 (2d Cir.), rev'd on other grounds, 382 U.S. 283 (1965). Moreover, there was no showing at trial that the ship owner in any way interfered with the stevedoring operations, created any hazardous conditions in connection therewith, or failed to provide a vessel reasonably free from peril. Thus, Maher's counterclaim against Chios on those grounds must fail.

MEMORANDUM OPINION BY MOTLEY, D.J.

There are two reasons why Maher's cross-claim against Isco, based upon the latter's alleged failure to properly inspect the pallets of pineapple brought aboard the vessel, must fail. In the first place, the jury found that the defect in the pallet was a latent defect which, by definition, could not have been discovered by the most meticulous inspection. Secondly, while the charterer (as between itself and the ship owner) was primarily liable for cargo operations, the stevedore assumed the responsibility of checking each pallet for safety when it undertook the cargo operations. Such inspection was necessitated by the warranty of workmanlike performance which it impliedly made to Isco.

Maher is not entitled to a total indemnity on its cross-claim against Castle & Cook, in view of the jury's finding that it had itself breached its warranty of workmanlike performance in that Maher failed to properly supervise and direct its employees in the unloading operation and to provide for the safety of its employees.

Castle & Cook is not entitled to indemnity from any party, although it will be jointly liable with Maher for the amount of the judgment, in view of the jury's findings. Its cross-claim against Isco on the basis of broad allegations of

negligence is without evidentiary foundation. Thus, no question of Isco's negligence was sent to the jury.

Finally, Castle & Cook filed a counterclaim against Chios on the basis of negligence and also breach of a contractual undertaking to provide a seaworthy ship and proper cargo handling operations. These allegations may be briefly disposed of. In the first place, there was no showing of any negligence by Chios and, consequently, no question of its negligence went to the jury. Secondly, the jury's finding of unseaworthiness was due, at least in part, to Castle & Cook's own negligence and use of a defective pallet. Thirdly, there was no proof at trial of any contractual undertaking by Chios to provide stevedoring services.

Judgment is accordingly entered simultaneously herewith.

Dated: New York, New York

January 15, 1976

Constance Baker Motley

CONSTANCE BAKER MOTLEY
U. S. D. J.

MEMORANDUM OPINION BY MOTLEY, D.J.

FOOTNOTES

1. This claim is found in a memorandum prepared by Chios setting forth its contentions with respect to the charterer's liability.

2. Pre-Trial Order, Exhibit A, p. 4.

3. See, generally, Restatement (Second) of Agency §§ 2, 216, 243 (1958).

4. 46 U.S.C. §§ 1300 et seq. Section 3(2) of COGSA, 46 U.S.C. § 1303(2) provides that "[t]he carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." In the circumstances of the Nichimen case, the term"carrier" referred to the charterer. 46 U.S.C. § 1301(a).

5. Based upon the record in the District Court, the Court of Appeals found that the loading and stowing of the vessel was done by the stevedores under the supervision of the Master and the Chief Mate, rather than under the supervision of the charterer's agent. 461 F.2d at 1018.

6. Assuming, of course, that the cargo damage is not due to some independent fault of the ship owner.

7. As revealed by the jury's answers to special questions.

ORDER AND ENDORSEMENT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

JOSE FERNANDEZ,

Plaintiff,

-against-

CHIOS SHIPPING CO., LTD.,

Defendant and Third-Party Plaintiff, et al.,

- -X

The motions of defendant Chios Shipping Co., Ltd., third party defendant Maher Stevedoring Co., Inc., and fourth party defendants Castle & Cook, Inc., Dole Corporation, and Castle & Cook Foods Corporation, for directed verdict and for judgment notwithstanding the verdict, are hereby denied.

SO ORDERED,

DATED: New York, N. Y.
August 5, 1975

CONSTANCE BAKER MOTLEY
U. S. D. J.

ORDER AND ENDORSEMENT

ENDORSEMENT.

Defendants, third party defendants and fourth party defendants have filed motions for directed verdicts and for judgment notwithstanding the verdicts rendered by the jury on June 6, 1975. Those motions are hereby denied. *Armstrong v. Commerce Tankers Corp.*, 423 F. 2d 957 (2d Cir. 1970).

(1) The jury could infer permanency as a medical finding of fact from the evidence presented at trial. *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107 (1959).

(2) The jury having found permanency of injury, its award of $23,700 for past pain and suffering over a period of seven years, and $32,300 for future pain and suffering for over sixteen years does not appear so excessive as to constitute a denial of justice.

(3) There was evidence from which the jury could find that Maher Stevedoring Co. failed to properly supervise its employees by providing an area for them to retreat to a safe place during the lifting of the pallet.

(4) The jury's finding that the pallet was defective could reasonably have been inferred from its breakinf without other apparent cause.

ORDER AND ENDORSEMENT

(5) No finding of negligence on the part of Castle & Coc was necessary; its liability for damages caused by the breaking of the pallet which it constructed was absolute.

DATED: New York, N. Y.
August 7, 1975

s/CONSTANCE BAKER MOTLEY
U. S. D. J.

SPECIAL QUESTIONS PURSUANT TO FRCP 49 ON THIRD-PARTY CASES.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

JOSE FERNANDEZ,

Plaintiff,

-against-

CHIOS SHIPPING COMPANY, LTD.,

Defendant and Third-Party Plaintiff,

-against-

MAHER STEVEDORING CO., INC., STATES MARINE LINES, INC.,

Third-Party Defendants,

and

CASTLE & COOK, INC., DOLE CORP. and CASTLE & COOK FOODS CORPORATION,

Fourth-Party Defendants.

- -X

CLAIMS FOR INDEMNITY AGAINST STEVEDORE AND AGAINST CASTLE & COOK - DOLE GROUP:

1. Have the parties claiming indemnity against Maher Stevedoring Co., Inc., sustained their burden of proving that the stevedoring company which unloaded the

SPECIAL QUESTIONS PURSUANT TO FRCP 49 ON THIRD-PARTY CASES

pallets breached its warranty of workmanlike performance by failing to properly supervise and direct its employees with respect to the unloading operation and to provide for the safety of its employees?

YES X

NO _____

2. Have the parties claiming indemnity against Maher sustained their burden of proving that the stevedoring company in unloading the pallets breached its warranty of workmanlike performance by improperly loading the pallet in question on to the forklift?

YES _____

NO X

3. Have the parties claiming indemnity against Maher sustained their burden of proving that the stevedoring company breached its warranty of workmanlike performance by failing to comply with the applicable Safety Regulation with respect to unloading by pallet?

YES _____

NO X

4. If the answer to any of Questions 1, 2, or 3 is Yes, have these parties sustained their burden of proving that the stevedore's action was a proximate cause of plaintiff's injuries?

YES X

NO _____

SPECIAL QUESTIONS PURSUANT TO FRCP 49 ON THIRD-PARTY CASES

5. If you find that the stevedore breached its duty in any of the respects discussed in Questions 1, 2, or 3, do you find that the Captain or any member of the ship's crew knew or should have known of the condition?

YES _____

NO X

6. If the answer to Question 5 is Yes, do you find that the ship's agents acquiesced in the longshoreman working under such condition?

YES _____

NO X

7. If you find that the answer to Question 5 and 6 is Yes, do you find that the ship's agents' failure to remedy the condition so outweighed the breach of the stevedore's duty so as to preclude indemnity from the stevedore?

YES _____

NO X

8. Have the parties claiming indemnity against the Castle Cook - Dole Group sustained their burden of proving that the pre-palletized pineapple unit which broke apart on being lifted was the result of negligence on the part of the Castle Cook - Dole Group?

YES X

NO _____

SPECIAL QUESTIONS PURSUANT TO FRCP 49 ON THIRD-PARTY CASES

9. Have the parties claiming indemnity against the Castle Cook - Dole Group sustained their burden of proving that the pineapple unit which broke apart was the result of a latent or hidden defect in the pallet?

YES X

NO _____

10. If the answer to either Question 8 or 9 is Yes, have the parties sustained their burden of proving that the Castle Cook - Dole Group's actions were a proximate cause of plaintiff's injuries?

YES X

NO _____

SPECIAL QUESTIONS PURSUANT TO FRCP 49 ON PLAINTIFF'S CASE.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

JOSE FERNANDEZ,

Plaintiff,

-v-

CHIOS SHIPPING COMPANY, LTD.,

Defendant and Third-Party Plaintiff,

-v-

MAHER STEVEDORING CO., INC. and STATES MARINE LINES, INC.,

Third-Party Defendants.

- -X

CHIOS SHIPPING CO., LTD.,

Fourth-Party Plaintiff,

-v-

CASTLE & COOK, INC., DOLE CORP. and CASTLE & COOK FOOD CORPORATION,

Fourth-Party Defendants.

- -X

SPECIAL QUESTIONS PURSUANT TO FRCP 49 ON PLAINTIFF'S CASE

SPECIAL QUESTIONS SUBMITTED TO THE JURY IN ACCORDANCE WITH RULE 49 OF THE FEDERAL RULES OF CIVIL PROCEDURE:

1. Has the plaintiff sustained his burden of proving that the vessel was unseaworthy?

YES X

NO _____

2. If the answer to Question 1 is Yes, has the plaintiff sustained his burden of proving that such unseaworthiness was the proximate cause of his injuries and damages?

YES X

NO _____

3. If the answer to Question 2 is Yes, what amount do you award to the plaintiff for the following?

(1) Lost wages from the date of the accident to the present. 4,400

(2) Medical Expenses: Date of accident to the present 2,000

(3) Pain and Suffering from the date of the accident to the present 23,700

(4) Future lost wages - Discounted to its present value 27,800

SPECIAL QUESTIONS PURSUANT TO FRCP 49 ON PLAINTIFF'S CASE

(5) Future pain and suffering - Discounted to its present value	32,300
TOTAL OF ALL DAMAGES	$90,200

4. Has the vessel sustained its burden of proving that the plaintiff was contributorily negligent?

YES _____

NO X

5. If the answer to Question 4 is Yes, in what degree, expressed in terms of a percent, was the plaintiff contributorily negligent?

_____%

6. If you find that the plaintiff was contributorily negligent and have determined the percent, subtract this percentage from the total amount awarded to the plaintiff or damages.

Total Amount	_____
Minus % of Contributory Negligence	_____
FINAL AWARD	_____

NOTE:

If you find that the plaintiff has failed to sustain his burden of proving that the vessel was unseaworthy and/or that this unseaworthiness was the proximate cause of his injuries then, of course, you will return a verdict in favor of the vessel owner by checking the space below.

_____ WE THE JURY FIND IN FAVOR OF THE VESSEL.

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Jose Fernandez
v.
Chios Shipping Company, Ltd.
v.
Maher Stevedoring Co., Inc.
States Marine Lines, Inc.

Chios Shipping Company, Lt.
v.
Castle & Cook, Inc., Dole
Corporation, Castle & Cook
Foods Corporation

June 3, 1975,
9:30 ..M.

--

(In open court - jury present.)

THE COURT: Good morning, ladies and gentlemen.

At this time the plaintiff may proceed by calling his first witness.

MR. KLONSKY: Your Honor, I have my first witness here, but I would like to read from answers to interrogatories first.

THE COURT: I will explain to the jury that in civil cases of this kind prior to trial lawyers submit to the opposite party certain questions to be answered by that party which may then be offered in evidence in the case and that is what Mr. Klonsky is about to do, read to you certain questions which he submitted to the defendant Chios Shipping Company.

MR. KLONSKY: Thank you, your Honor.

MR. KENNY: What answers?

MR. KLONSKY: Interrogatories propounded by Chios Shipping Company to Dole.

THE COURT: Just a moment. You say those are interrogatories by whom?

MR. KLONSKY: By the shipping company to Dole.

THE COURT: In this case, ladies and gentlemen, these interrogatories were submitted by the shipping company, Chios, to the packaging company, that is the Dole group. Suppose we refer to Castle & Cook, Inc. and Dole Corporation as the Dole group for convenience.

MR. KLONSKY: These are interrogatories propounded by Chios Shipping Co., Limited, defendant, third and fourth party plaintiff to fourth party plaintiff, Dole.

THE COURT: Try to read less rapidly, Mr. Klonsky.

MR. KLONSKY: I shall.

A subdivision of Castle & Cook, Inc. incorrectly sued as set forth in the above caption to be answered under oath.

The interrogatories are addressed to the fourth party defendant in regard to its shipment of prepalletized packages of cartons of pineapple aboard the SS Chios from Dadiangas to Newark, New Jersey. Invoices are to be

submitted to Chios for copies of material is to be attached thereto.

1. How many prepalletized packages of cartons of pineapple were delivered to be loaded aboard the Chios?

72,506 cases of product were loaded aboard the Chios.

2. When, where and by whom and to whose address were they delivered?

To whom delivered, where, first to Delafield, Dole, Philippines, Inc.

Calumpang Shipping Terminal, then to Dole Company, Virginia, USA, Dole Company, Newark, New Jersey, USA.

Upon unloading in New Jersey they were received by Maher Stevedoring Co. Maher Stevedoring Co. then delivered the product to Dole.

Maher warehouse kept records of receipt. Defendants did not have records on this.

3. It says see number 1 above so I won't read that.

4. Where, when and by whom, address. Were they loaded aboard the Chios stating the holds, their level and the number stored in each place.

Answer to 4. The product was loaded aboard the Chios by a local stevedoring outfit, Minoros, under contract

with Dole Philippines. Chios Shipping Co. would not know the levels.

Dole Philippines, Inc., delivered the product to dock, MS Chios, Dadiangas, Catabato, Republic of the Philippines. See attached documents.

5. Where, when and by whom, address where the prepalletized cartons of pineapple packaged.

Answer 5. The product was packaged at Dole Philippines, Inc., Polomok, South Cotabato, Philippines. Dole Philippines, Inc. no longer has information as to when the canned product on the Chios was packaged into the cases.

6. When the cartons of pineapple were packaged on the pallet, state how many cartons were placed on each pallet.

Answer: There were 753 pallets and gross pounds of 2,661,534 pounds depending on the product weight of each pallet varied.

7. --

MR. REID: You omitted Question 6B.

MR. KLONSKY: What was the weight of each carton, I read that.

C. How each carton was placed, I read that.

7. Were the cartons fastened to one another and

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the pallets in any way whatsoever and if so, one, the name, kind or type of fastening material.

Answer: Palletizing glue.

2. The quantity used for each carton in the pallet.

Answer: Two strips.

3 under 7. The place of tie on each carton in the pallet.

C. On tops, bottoms.

4. The manner and means by which it was applied.

By hand.

5. If applied by machine attach a photo of machine. That is inapplicable.

THE COURT: What did you say?

MR. KLONSKY: The last one I said was inapplicable.

THE COURT: Try to read less rapidly, please.

MR. KLONSKY: Yes, I will try my best.

8. What was the place of origin of shipment of the prepalletized packages?

Answer: See 4 and 5.

9. When, where and by whom, address, were the prepalletized packages from the place of origin to the place of delivery for loading aboard the Chios. What was the means of conveyance. How were they loaded and discharged

eoh 30

on the conveyance and what means were used. How were they stowed on the conveyance. D. In lieu of a notice to produce, attach a copy of the delivery receipt, if any, issued for the conveyance.

9. Flatbed trucks, 20-ton capacity were loaded and unloaded by forklift by Dole Philippines, Inc. The packages were palletized and laid on top of each other at Dole Philippines, Inc. No delivery receipt was issued to the truck because the trucks were those of Dole Philippines, Inc.

10. Was there any damage to the prepalletized packages during transit from the point of origin of shipment to the place of delivery for loading aboard the Chios.

There are subparagraphs under that but the answer would cover them all and says Dole Philippines, Inc. has no record or recollection of any damage. All records have been disposed of. Dole Philippines, Inc. no longer has any records of such information nor the personnel who would know.

11. Was there any damage to the prepalletized packages the place of delivery for loading on the Chios to the actual loading and stowage aboard the Chios. The answer to that which covers the subparagraphs, information may be available from Chios or Menob Bros. Defendants do not keep or have

eoh

such records. Defendants have no records remaining if any ever existed.

I will skip 12 because the answer is the same, they have no information.

13. When, where and by whom, address, were the pallets constructed or built.

Answer: The pallets were built by Dole Philippines from lumber pre-cut for such purposes by a local lumber company, Bangkal, in Davao City, Philippines. Local lumber, Lawaan, were used. Sizes 40 inches by 48 inches. Pallets nailed on 3 notched 2-inch by 3-5/8 inch stringers withtwo and a half inch CW nails.

14. When, where and by whom address were the pallets designed.

Answer: Dole Philippines, Inc. is unable to recall exactly when or where the pallets were designed. They are made of Lawaan, Philippine hardwood, originally designed in Hawaii at Dole Company, Honolulu and in accordance with specifications of the National Wooden Pallet Manufacturers Association, Washington, D.C.

15. Was design reduced to writing, print or drawing. If so, A, in lieu of a notice to produce, attach a copy of the design.

Answer: Yes, but defendants are unable to locate the

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original drawings. Copies were originally circulated to the lumber company and other suppliers, but they have been lost.

16. Was a mockup model made of the design. If so in lieu of a notice to produce attach a copy of the design.

Answer: A mockup model was produced originally to test 2 design. Defendangs no longer have the mockup model.

17. If the design of the pallet was not reduced to writing, print or drawing, state how the pallets were usually constructed.

Answer: The lumber was cut into sizes 40 inches by 48 inches. The pallets were nailed on 3 notch 2 inch by 3-5/8 inch stringers with two and a half inch CW nails. The lumber was supplied to Dole Philippines by Bangkal and the pallets were built usually by Dole Philippines 30 days prior to use.

18. Set forth in regard to the pallet, A, name, kind or type of materials used. B. The dimensions of the material. C. Arrangement of the materials one with the other. D. How the materials were fastened one to the other. E. The name, kind or type of the materials used in the fastening and th ir dimensions. F. Outside dimensions of the pallet. G. Weight of the pallet. H. Permanent devices if any used to lift the pallet.

EXCERPTS FROM TRANSCRIPT.

Answer 18: See 17, weight is unknown. The pallet was lifted by forklifts at Dole Philippines, Inc. It was loaded on the ship by using ship's derricks with bridles. Forklifts were used in the ship holds to store palletized goods.

I will go down to 30.

Will you in lieu of a notice to produce make available for inspection at a mutually convenient time a prepalletized package of cartons of pineapple like that shipped aboard the Chios which is the subject of the plaintiff's claim.

Answer: Defendants will make available a palletized loan. However, defendants cannot guarantee that the load will be the same as shipped by Chios. Defendants ship at alternate times from the Philippines to the Newark pier. Defendants can only in accordance with shipments to that pier. Signed within, attorneys by Patrick L. Witt.

Mr. Romero.

C Y P R I A N O R O M E R O, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KLONSKY:

Q Mr. Romero, if you don't understand or can't hear us, let us know.

THE COURT: I would like to suggest, Mr. Klonsky, that you move the podium back beyond the counsel table for the defendants so that they can hear you and the witness can throw his voice so the jurors can all hear him. Please stand back beyond Mr. Reid.

You are also blocking Mr. Reid's view of the jury.

Q Is it Mr. Cipriano or Mr. Romero?

A Mr. Cipriano. My last name is Romero.

Q Your last name is Romero?

A Yes.

Q So I will call you Mr. Romero.

A Okay.

Q If you don't hear us or don't understand the question, please let us know, all right?

A Yes.

Q Mr. Romero, are you here pursuant to a subpoena that had been served on you?

A Yes.

Q What do you do for a living?

A Work as a longshoreman.

Q You are a longshoreman?

A Right.

Q How long have you been a longshoreman?

A 14 years.

Q Where are you now employed?

A By Maher Stevedore.

Q M-a-h-e-r?

A Yes, Maher.

Q How long have you been employed by Maher Stevedoring?

A About 14 years.

Q The same company all the time?

A Yes.

Q What is the nature of your work with the gang of stevedores?

A I used to work on the Victriano.

Q No, I asked you what is the kind of work you do as a longshoreman?

A Down in the hold.

Q You are a hold man?

A A hold man, yes.

Q There is also a deck man and there are also dock men, is that right?

A Dock men,yes.

Q On September 1, 1968, how many men were in your gang?

A 21.

Q With the hatch boss?

A Yes.

Q How many were down in the hold?

A Down in the hold is 12 men.

Q 12 men?

A Yes, I think. In 1968 I don't remember.

Q You are not sure, are you?

A No, I am not very sure.

Q On the main deck was there a signal man?

A Yes.

Q Was there a winch man?

A Yes.

Q Was there a hatch boss?

A A hatch boss.

Q On the dock --

A Four mens --

Q Four men on the main deck?

A Up on deck. One hatch boss and 12 men down in the hold. And four men on the dock. Four men on dock, four on the dock and a hatch boss and 12 men down in the hatch. I think it is 21.

Q Were you always working at Port Newark when you worked for 14 years?

A Right.

Q Do you remember working aboard a ship called the

SS Chios on September 1, 1968, when Mr. Fernandez was hurt?

A Right.

Q What time did you go to work that day, do you remember?

A 8 o'clock in the morning.

Q Was this the first day for your gang aboard the ship?

A It is not my gang.

THE COURT: Mr. Klonsky, the reporter is having great difficulty because you speak so rapidly. Please try to slow down so he can get the question.

MR. KLONSKY: Please read back the last question.

(Read)

Q This is not a regular gang?

A No, yes, it is a regular gang, it's a company gang. My gang on that day didn't work.

Q So you shaped up for this gang?

A Yes.

Q But did you work at Port Newark with your regular gang, too?

A Right.

Q In the course of your work at Port Newark did you ever before discharge pineapple?

A Yes.

Q What I want to know is on this day was this the first day you came aboard this ship to do the work for this voyage?

A I don't understand.

Q Had you been on this ship the day before the accident?

A I don't remember that.

Q You don't remember?

A No, I don't remember the day before.

Q Was Mr. Fernandez a member of your gang, regular--

A Yes, he used to be regular on my gang

Q When it had worked?

A Yes.

Q But he also came to this make-up gang just like you did?

A That's right.

Q What was his work on September 1, 1968?

A His work was on 16.

Q Was he also a hold man?

A Yes, a hold man.

Q Was he a hold man, too?

A He is a hold man too, yes.

Q What does a hold man do?

A Four men hook it up the drafts. When we start

break half the square, clean them up, it is down in the lower hold.

Q I am not asking you what happened that day. I am only asking you what a hold man does.

A Hook it up.

Q They hook up?

A Yes, just to hook up.

Q They hook up what?

A The pineapple. The drafts.

Q How do they do that?

A When they put them in the square.

Q Let me ask you this: When you came to work that day --

A Right.

Q -- what hold did you go to?

A Number 3.

Q Number 3?

A Number 3 hatch aft.

Q Who opened up the hatch, if you know?

A We opened it up.

Q You opened up the hatch?

A Yes, the guys, all the gang of guys.

Q Then you went down. Where did you work first, do you remember, which level?

A We started on the lower hold.

Q You started in the lower hold?

A Right.

Q When you went to work and saw the lower hold, what was down there, what did you see there?

A Pineapple.

Q Did you see anything else besides pineapple?

A No.

Q Could you tell us before you started what that cargo looked like in the number 3 lower hold?

A I explain to you, come in pallets,in packages.

Q These were not stevedore's pallets, were they?

A No.

MR. BRADY: Objection, your Honor, that is a leading question at this stage.

MR. KLONSKY: I do hope I can ask some leading questions.

THE COURT: In view of the difficulty with this question. The witness apparently doesn't speak English very well. Proceed.

MR. KLONSKY: Thank you, your Honor.

Q Mr. Romero, when you first looked at this cargo, was it all over the deck or was it in certain parts of the hold?

A Right.

Q Where was it?

A It was down in the lower hold.

Q Where did it extend, did it go into the wings?

A Yes.

Q Was it in the square of the hatch, too?

A No, half of the square --

Q When you started that morning?

A We started in the square.

Q Was half of it open?

A Yes, the hatch was open.

THE COURT: Mr. Klonsky, give the witness a chance to answer, please.

MR. KLONSKY: I don't think he understood my question.

THE COURT: Try not to interrupt him when he is answering.

Q When you first started to work that morning, before you took out your first draft, before, what did it look like down there?

A It looked even in the square, you know, two pallets high, right. We take the square--

Q Tell me what you saw, not what you did. You saw the pineapple in the square of the hatch?

A Right.

Q The entire square?

A The whole square, the whole hatch.

Q What about the wings?

A Right.

Q In the wings, too?

A The wings, everything in the whole hatch down there.

Q It was what you call palletized?

A Palletized, yes. They come in palletized.

Q What is a pallet?

A The pallets, I don't know.

Q Could you describe a pallet to us?

A The pallets is about 48 inches wide, by four feet long.

Q How high to each pallet?

A It's about I'd say, about eight packages.

Q Eight packages?

A Yes.

Q How high would eight packages be on top of this pallet?

A I would say about five feet.

Q Now, how is the cargo taken out of the wings and brought into the square of the hatch?

A With a machine.

Q You say a machine, what kind of machine?

A Hi-Lo.

Q The Hi-Lo has forks that go up and down?

A Right.

Q It fits its blades into the pallet?

A Right.

Q The pallet itself is two layers of wood with a separation so that you can put the blades in between them, right?

A Right.

Q Right on top of that is the cargo?

A Is the cargo.

Q So the machine or the Hi-Lo would go into the wings, take the cargo and bring it into the square?

A Into the square.

Q Where it would be under the plumb line of the up and down movement?

A Right.

Q You would hook it up and it would go out?

A Right.

Q Tell me what you used to hook it up with?

A We call them bridles.

Q Bridles?

A Bridles, yes.

Q Could you describe them for us? Describe the gridles.

A It's like an angle iron, you know.

Q Go ahead.

A It is down and then comes this and they go underneath the pallet.

Q Do they have two angle irons or one?

A Two.

Q There would be a cargo hook?

A One for each side.

Q There would be--

A Right.

Q Something that goes to the angle iron --

THE COURT: Let the witness tell us. Give him a chance to tell us.

Q Go on.

A They take the drafts under the wing.

Q We are still talking about how we do it. There is a cargo hook, isn't there?

A Yes.

Q The cargo hook, the hook?

A The bridle.

Q What is that hook attached to?

A They attach them under the pallet.

Q The hook isn't put under the pallet, something else is put under the pallet?

A The bridles.

Q The bridle?

A Yes, the bridle. We call them bridle. We don't call them hooks.

Q Does this angle iron fit into the sides of the draft that is going to be discharged?

A Right.

Q It is like a right angle, isn't it?

A Yes, it is an angle.

Q Who owns these bridles, do you know? Who owns the bridle?

A Maher,the stevedore company.

Q How many do you take out at one time?

A Take one at a time.

Q After the Hi-Lo has brought the cargo to the square of the hatch to be discharged?

A Right.

Q Your job was hooking up?

A No. My job is to clean the damage out of the cargo, the damage, out of the top of the cargo. They come sometimes a few pieces of damage or a lot of damage. My job is that I clean them up the damage out of the top.

Q The dunnage is loose pieces of wood?

A Right. I throw them on the square and I put them on the side.

MR. BRADY: Objection.

THE COURT: Yes, just a moment, I didn't get your objection.

MR. BRADY: Yes, I have an objection, your Honor.

THE COURT: What is it?

MR. BRADY: Leading question at this stage, your Honor.

MR. KLONSKY: I asked him what dunnage was, your Honor.

THE COURT: Ask the witness and then give him a chance to answer, Mr. Klonsky and then if it appears he doesn't understand, then ask him again, but you are not giving the witness a chance to answer any question. We don't know whether he knows or not.

Q What is dunnage?

A Dunnage are pieces of wood.

Q What do they use it for?

A They use them sometimes to put a level of the cargo, you know, when they put one palletized on top of the other.

Q It separates the drafts?

A Yes, to level it up. So the top of the draft

will be level.

Q On that day what was Mr. Fernandez's job in the hold?

A To hook it up.

Q He was a hooker up?

A Yes, the one that hooks it up.

Q Is he the one who took the angle irons in?

A Yes, one angle iron and the other guys they put the other one.

Q He had a partner in hooking up?

A Yes.

Q Do you know his partner's name?

A The man's name, no, I don't know.

Q At about 12:30 did an accident happen that day?

A Right.

Q Did you see it?

A Yes.

Q Tell us in your own words what happened.

A Well, I stay right on top of the other half of the square because the pineapple come out all on our port. They go some place else. I stay on top in the square fore end of the ship because I have got to stay on top of the other cargo to see if there is some pieces of dunnage on top, I take them off, I clean them off before the machine

they take them to the square.

Q I asked you did you see the accident happen. I asked you to say what you saw.

A I'm sorry.

Q Go ahead and tell us what you saw.

A I saw they bring one pallet under the wing, just under the wing a little bit, you know, started taking the pallets under the wing of the pineapple. They put one pallet right in the square, not in the middle of the square, on the side of the square, on the in-shore side. They put this pallet on the floor.

Then this man, the winch come down --

Q You mean the hook came down with the bridle?

A The hook come down with the bridles and this man they hook it up. This man hooks it up and the machine they go back to get the other pallet, right. This is the top pallet, they take them off.

They go back for the second pallet and these guys they hook it up. As soon as they hook it up they brace it up to take them outside.

Q It was raised from the blades?

A Right. The pallet breaks right in the middle.

Q Did you see this?

A Right, I see it.

Q What happened when it broke?

A When they broke, they break it right in the middle and the packages they split right out. The guy they stay in-shore between the machine and the pallet.

Q Mr. Romero, when the packages broke, what did you see happen with Mr. Fernandez?

A I see Mr. Fernandez when the packages broke they fell, I see Mr. Fernandez right on the floor already.

Q Did you see it hit him?

A And bleeding.

Q Did you see the packages hit Mr. Fernandez?

A Well, I see Mr. Fernandez down on the floor. I see him he is bleeding. When they break, when the draft breaks, when they broke.

Q You say right after it broke you saw him on the floor?

A Right.

Q Bleeding?

A Right.

Q Bleeding from where?

A Bleeding from over here on the left.

Q Indicating the left frontal part of the head?

A Right.

Q What did you do after that?

A I go down, I take my handkerchief out of my pocket. I stop the blood. They call them right away--what they call it.

Q Ambulance.

A The ambulance and first aid man. The first aid man they come right away to stop the bleeding because I got the handkerchief right on his head over here because he's got blood all over the shirt, all over the face and everything. He is bleeding very bad.

Q Was he talking to you?

A No, no.

Q Were his eyes open or closed?

A His eyes were closed.

Q He was out?

A He was out complete.

MR. KLONSKY: Your witness.

CROSS-EXAMINATION

BY MR. REID:

Q Would you tell us what the inside of the square of the hatch was, the entire hatch?

A The whole hatch?

Q Yes.

A I'd say about 60 feet long, more or less, I don't know, I never measured the hatch, you know, the square,

more or less I would say about 30 or 40 feet wide, the square, just the square.

Q I am talking about the width from the ship's side, one side of the ship to the other.

A Well, over there we got about eight feet, eight, ten feet at the most where we started to take the pineapple out from under the wings.

Q I am talking about, the question I asked you the distance across the hatch from one side of the ship to the other.

A All the way across.

Q I am not talking about the square now.

A You are talking about inside the wings. I'd say about ten feet where we started working over there because the ship goes this way. It is two piers of pineapple they are coming over there and they come on the full length, they come more wide.

Q Maybe you don't understand me, sir.

A I understand but maybe I don't know what I explained to you. You understand what I mean.

Q This is the bottom of the hatch?

A Right, right.

Q This is the side of the ship?

A Right on the outside.

MR. KLONSKY: Skin to skin.

THE WITNESS: The steel.

Q On top you have what is called the square of the hatch, the opening?

A Right.

Q Now, what is the length of the hatch. I am not talking about the square, the length of it.

A I said ten feet, I figure about ten feet. I don't know exactly, you know, about ten feet.

MR. KLONSKY: He is talking about the wing.

THE WITNESS: I said the wing, on the wing where we started to work is about ten feet.

MR. KLONSKY: He wants to know from skin to skin.

THE WITNESS: Skin to skin, I don't know. I never measured. I don't know. I can't say that.

(Defendant Chios Exhibit A marked for identification.)

xx

MR. REID: If the Court pleases, may I exhibit this to the jury and point out to them the number 3 hatch.

THE COURT: Yes.

MR. KLONSKY: We can agree on the figures if you wish to.

THE COURT: Are you offering that in evidence?

MR. REID: It is in evidence.

THE COURT: We haven't received it yet. You simply marked it. Is there any objection to that?

MR. LARSEN: No objection.

MR. KENNY: No objection, your Honor.

MR. KLONSKY: No objection.

THE COURT: It will be received in evidence, the diagram of the ship is received in evidence.

xx (Defendant Chios Exhibit A received in evidence.)

(Mr. Reid explained Defendant's Chios Exhibit A to the jury.)

THE COURT: What are the dimensions of the hold as agreed upon?

MR. REID: I will see if I can read that. I need a magnifying glass.

MR. KLONSKY: Can this be held in abeyance until the recess?

MR. REID: We will find that out, your Honor.

THE COURT: All right.

MR. REID: It seems that when they Xeroxed this, they Xeroxed part of it upside down. We will have to translate the numbers right side up.

Q Let's go back to an illustration. Say this is the square of the hatch where they take the cargo up and down.

A Right.

Q This is the, the green sheet of paper is the top line of the hatch itself, the full dimensions of the hatch. Say this is the forward part of the hatch and this is the --

A Aft.

Q Over here on the left-hand side is the port side and over here is the starboard side, the right-hand side.

A The starboard side is for the water. The starboard side.

Q Which was the offshore side?

A Offshore is on the side of the water. We call them offshore.

Q Was that the port or starboard side?

A On the starboard side. This is called offshore and inshore, that is up against the pier.

Q The starboard side was the offshore side?

A Right.

Q Let's turn this around this way so that we can say that the inshore or the dock side is over here to my left.

A Right.

Q Where were the pallets stowed when you went aboard at 8 o'clock?

A We started right in the square.

Q All in the square?

A All in the square.

Q How high were they stored at that point?

A In the square, I don't remember very sure, but I think it was two high. Two palletized high.

Q How many cartons of pineapple were there to a pallet?

A I said about six or eight.

MR. BRADY: Object to that, your Honor. That is sort of a guess.

THE COURT: Pardon me.

MR. BRADY: If it is a guess I will object.

Q Your best recollection.

A Pardon me.

THE COURT: Do you remember precisely how many there were to a pallet?

THE WITNESS: I never counted. We work over there, we never count how many, but more or less this is the way I guess about six or eight.

THE COURT: Is it a guess or do you remember, is that your best recollection?

THE WITNESS: I remember eight high packages. Eight packages high.

Q Were there also pallets stowed around in the

wings opposite the square of the hatch?

A Right.

Q How high were they stowed up, how many tiers?

A In the wings it is three high.

Q When you went to work at 8 o'clock, did you take the pallets out from the square of the hatch first?

A Right.

Q And then after that was accomplished you put--

A The machine in the hold.

Q The Hi-Lo machine?

A The Hi-Lo machine in the hold.

Q That took you to the wings from the square?

A The inshore side we started.

Q Which side did you start to work on after you had discharged those from the square?

A On the inshore side.

Q Now there were three tiers high?

A Yes, it is two regular pallets about eight high and they got about four packages on the top pallet because they go inside and they can a little, about a couple of boxes higher. This is the way they stow, they load them over there where the pineapple come from.

Q Now, at the time of this accident how many pallets had been moved out into the square of the hatch?

A One at a time.

Q One?

A Yes.

Q And was this the one which broke at the time of the accident?

A Right. It is the one that broke when they started to go up. They broke it in half.

Q Where was the Hi-Lo at that time?

A He goes for the second one on the back, right behind the pallet.

Q How far was the Hi-Lo away from the pallet which broke at the time of the accident?

A About six feet.

Q Was the inshore side the first side that you started to discharge after you had taken them out of the square?

A Right.

Q How far had you gone into the wings to take it out?

A I mentioned it before. I figure, I don't know very sure, I can't say that. I don't know very sure. I mentioned it before, but they don't want me to guess, I can't guess. I said about ten feet for the square to the coaming into the wall of the ship.

MR. KLONSKY: That is the wing.

THE WITNESS: In the wing.

Q This blade of the Hi-Lo, is that about four feet?

A Yes, about four feet high.

Q The Hi-Lo is about six feet?

A No, not even. It's almost about five feet I think, is palletized is four feet and three feet was the machine, the Hi-Lo goes into the three feet, you know, they go and get to the pallet.

Q When you take the entire length of this Hi-Lo?

A It's four feet. Four feet long for three wide, width.

Q I am talking about the blade itself.

A The blade is about four feet.

Q Now, from the point where the blade is attached to the machine, what is the length of the machine itself where the man sits to operate it?

A The operator.

Q Is that about six feet?

A About six feet, yes.

Q So the entire length from the blade to the end of the Hi-Lo is about ten feet?

A Yes, about ten feet.

Q When the Hi-Lo operator was taking the drafts out or the pallets out, his machine some of the time was

in the square of the hatch, wasn't it, before he even started to take them out?

A Right, the machine when we cleaned the square, we put the machine down below in the hold.

Q This particular pallet which broke, you say that that had been stowed about six feet from the square of the hatch?

A I figure about six feet from the square of the hatch.

Q So when the Hi-Lo picked it up that was about four feet of the Hi-Lo extending in the square of the hatch?

A Right.

Q So the Hi-Lo had to back out to get into the square of the hatch?

A When he gets the pallet, he don't have much room yet because they have the other pallets in the back. When he gets the pallet he turns around a little bit, just turns around and he puts it right on the edge of the square, you know, on one side. He can't come out because the square is a little higher than the floor of the ship under the wings. It is about one feet high. The machine can come right out to the middle of the square. They put them right on the edge of the square, between the square and the coaming. I'm sorry, I can't pronounce.

Q This pallet which broke?

A Right.

Q Where was that placed on the deck by the Hi-Lo before it was picked up? In other words, where was it with reference to the square of the wing?

A I'd say about three feet out of the square. About eight feet high when they broke.

Q No, what I am asking you is, if we look at our illustration here again, say this is the inshore side.

A Right.

Q Where was this pallet placed by the Hi-Lo for it to be taken out before they hooked it up?

A How far is it for where, for the square, in the square?

Q Where did he put it down?

MR. KLONSKY: May I make an application, your Honor?

THE COURT: Yes.

MR. KLONSKY: We have an official court interpreter but he is with Judge Griesa and he says he will be here very shortly. I think we would all benefit by having an interpreter so can we await his arrival. He said about 15 minutes ago it would be about half an hour he would be available.

THE COURT: Another half hour?

MR. KLONSKY: We can go check this.

THE COURT: Let him go check and we will proceed in the meantime. Try to listen very carefully to the question before you answer and stop and think a minute as to what his being asked before you answer.

Is there a question now?

MR. REID: Mr. Reporter, can you read the question to the witness?

(Read)

A He asked me before.

THE COURT: Put another question.

Q The Hi-Lo went into the inboard side of the wings?

A Right.

Q It picked up the draft with the fork?

A Right.

Q Backed out and it put the pallet down on the deck?

A On the floor,yes.

Q Where was it with reference to the square of the hatch where they put it down on the deck?

A I don't understand that question.

Q Say that the green paper here is the wing.

A Right.

Q The white paper is the square of the hatch?

A How far it in the wing the draft?

Q With reference to the wing and the square of the hatch.

A Right.

Q Did they put it down?

MR. KLONSKY: Where did the Hi-Lo put it down?

A They put them right on the inshore in the square, inshore side.

Q Inshore side?

A Right.

Q Was the square of the hatch partly up above?

A Yes, they come right straight with the coaming. You understand me?

Q From that point it is hooked up with the bridel?

A Right.

Q You speak of a bridle as being an angle iron?

A Aluminum.

Q Aluminum?

A Aluminum angle.

Q Could you describe that, is it in the shape of an L or what?

A Yes, it is like L, you know, with two pieces on the side, you know close in. It looks like an L.

Q Is this aluminum solid?

A Right.

Q Is it a rod?

A No, I don't think so.

MR. KLONSKY: He said solid.

THE WITNESS: Solid aluminum.

Q But is it shaped like a rod, round?

A No, no, it is not round. It is flat.

Q Where is that placed with reference to the pallet?

A Where the draft was of the pallet.

Q Where is it placed with reference to the pallet when you are hooking up?

A Hooking up on the small side, they hook it up on the small side because they can't hook on the right side where they are supposed to hook it up. They hook it up on the small side, you know, on the small end.

Q To get back to an illustration --

A This is all right to show me. That is the pallet.

Q This is the pallet. Where does that angle go?

A This way, on this side. On the small side.

Q Does it go underneath?

A No, this way. Like you have the hand over there.

Q I am going to ask you to show us.

A Right, okay, I show you.

Q You can do it better than me trying to point out to you.

A This is the pallet. There is the shape of the pallet.

Q Yes.

A Now, this is the long and this is the width, you know. I said about three feet width.

Q You said four by forty.

A All right. The right way to hook the pallet is this way, but sometimes you can't hook it up the right way because you don't have no room down there to hook it up, the way they put the machine, the machine they take them off and they put them in the square. They have chocks, two pieces of chocks, two pieces of wooden, you know, 4 by 4's or a platform.

Now, the machine they put them on top of the chocks. They hook it up this way.

THE COURT: Are there witnesses in the courtroom? Please go in the witness room.

Q You have got your hands up on the side now.

A Not this way. This is the right way to hook up the pallet. They hook it up this way.

Q How do they hook it up this way?

MR. LARSEN: I didn't get that answer. I would

like to have it read back, if your Honor please.

THE COURT: Read the previous question and the answer.

(Read)

Q Just show us what they use to hook.

A I mentioned to you before.

Q The angle irons?

A Yes, with the bridles. We call them bridles.

Q How does the angle iron fit on each side?

A They fit underneath. This is the way I told you.

Q Underneath?

A Underneath the pallet.

Q Does it go all theway underneath it?

A No. Way underneath, I can't say go underneath. It is six inches over here and six inches over here (indicating) this bridle. Six inches deep.

Q In other words, it comes down straight and then at angles?

A It goes underneath.

Q Do you have two on each side?

A Right. One on each side.

Q One on each side?

A One on each side.

Q How big is that platform that goes underneath

the pallet?

A Yes.

Q How wide is it?

A About six feet.

Q Six feet wide?

A Wide.

Q Each one?

A Right.

Q And then you have a wire that goes up to the cargo hook?

A Right.

Q They both join, go up and join?

A It joins on the hook with the winch.

Q Is there a spreader bar in there?

A A spreader bar, yes.

Q At the top?

A On the wires.

THE COURT: Was there any what?

MR. REID: Spreader bar. It keeps the wires apart.

THE WITNESS: That's right, that's right.

Q It was Mr. Fernandez's job to put the angle hooks?

A Right, right.

MR. KLONSKY: Angle iron.

Q The angle iron.

A The angle iron.

Q Was there any tail line on the pallet?

MR. KLONSKY: You mean tag line.

Q Tag line.

A Tag line on the pallet,no. Tag line, wait a minute, just a minute. What do you mean tag line, what's that?

Q That you hold on to.

A No.

Q So when it was picked up by the cargo winches from here, it would swing out in the square of the hatch and then go up (indicating).

A Yes, that's right.

Q Now, these packages, these cartons of pineapple on the pallets, were there any wire strapping or ropes around the cartons and the pallet?

A No.

MR. REID: No further questions.

CROSS EXAMINATION

BY MR. KENNY:

Q Mr. Romero --

A Yes.

Q -- when this pallet broke--

A Right.

Q -- how high was it off the deck?

A Off the bottom of the ship?

Q Right.

A I'd say about ten feet, eight, ten feet high.

Q Eight to ten feet high?

A Right.

Q What was lifting it off the deck?

A The bridles.

Q Now, this method that you described to remove these pallets from the number 3 lower hold, was that the same method that was used all day on September 1, 1968?

A The same.

Q The same method?

A Right.

Q Was that the same method used to discharge pallets of pineapples in all your experience at Port Newark?

A Right.

Q Mr. Reid asked you a question about a tag line.

A Right.

Q Did these pallets ever come equipped with tag lines?

A No.

Q So it was normal?

A Normal, yes.

Q That there wouldn't be any tag line, right?

A No.

Q It was normal?

A Normal, yes.

Q No tag line?

A No tag line on it.

Q During the course of discharging this vessel on September 1, 1968, from the number 3 lower hold, did any other pallets break?

A Sometimes break some pallets.

Q On September 1st?

A On September 1st, no, they break that pallet at 12:30.

Q 12:30?

A Yes.

Q No other pallets broke before 12:30?

A No.

Q This method of discharge was the usual way?

A Right.

Q You saw that pallet eight or ten feet above the deck before it broke, is that right?

A Right.

Q So you saw that pallet for at least eight feet when that wood held, right?

A Right.

Q That pallet broke without warning, didn't it?

A That morning?

Q Without warning.

A Yes, as soon as they go about ten feet high, they split it in the middle.

Q There was no warning to the longshoremen that that was going to break, was there?

A No, we don't think it broke that pallet.

MR. KENNY: Fine. No further questions.

CROSS-EXAMINATION

BY MR. LARSEN:

Q Mr. Romero, had you been working in the area where the broken pallet had been stowed just before the accident?

A Yes.

Q Had you removed any dunnage from around that particular pallet?

A Right, before they move the pallets.

Q Did you have an opportunity at that time to look at that unit before it was taken by the Hi-Lo?

A No, I don't have no opportunity.

Q You did remove some dunnage from around there?

A That is my job.

Q That was your job to take the dunnage boards out

that were placed between the various palletized units, is that right?

A Right.

Q Did the stow of this cargo appear to be level or trim?

A It's my job to some box, you know the weight of the ship, when they come in on the water, some pallets, you know, some cases are out of the pallet. It is my job, I see a case before they take them off, they touch, I see the case, I put them in place into the position where they are supposed to be. That is my job.

Q You put them back in the unit, is that right?

A Right.

Q Did you do it with respect to this unit that broke that afternoon at 12:30?

A I don't know.

Q Did you walk on top of these units to remove the dunnage boards?

A No, not on the space where they started to take them off underneath the wing. I look before, but I don't see no dunnage over there.

Q Did the stow of the cartons appear to be fairly level?

A Right.

Q Who drove the Hi-Lo that took this palletized unit from the wing over to the square of the hatch?

A I don't remember.

Q Was he a member --

A It's a driver, but I don't remember who he is.

Q Was he a member of the gang that you were working with?

A I think so.

Q In the hold were there all Maher people?

A Hey?

Q In the hold where you were working, was it only Maher stevedoring people down there?

A Yes.

Q Did you see anybody from the crew or officers of the ship?

A No.

Q Did Maher have a safety man at Port Newark?

A Right.

Q Did he go down into that hold while were working there on September 1, 1968?

A I think he did. He goes before we start discharging.

Q Did you see him, did you physically see him in the hold?

A When--

Q Did you see him with your eyes?

A When he goes to take the patient out, Joe Fernandez, when we take him out, when the pallet went to the pier.

Q That's about 12:30 or so?

A Right.

Q What time did you go into the hold that morning?

A 8 o'clock.

Q Did you see the safety man from 8 o'clock up to the time of the accident?

A No.

MR. LARSEN: I have one or two questions, your Honor. I would like to use that book that Mr. Reid used before.

BY MR. LARSEN:

Q With respect to the pallet itself, Mr. Romero, is one side longer than the other?

A Right. The pallet is not a square.

Q It is not square?

A It is not a square.

Q Again going back --

A Wait a minute, that's the shape of this book, the way it was.

Q It is wider than it is long?

A It is longer than wide.

Q Usually the aluminum angles, what side of the pallet are they placed under?

A They are supposed to go on this side.

Q The longer dimension?

A The long dimension.

Q The unit that was lifted up just before the accident, were the angles under the long sides or the short sides?

A On the short side.

Q Is that the usual way it is done?

A Sometimes they hook it up when they let the pallet, they put that pallet in the square. They put the pallet, if they have got no room for the machine, they bring the pallet this way.

THE COURT: I can't hear you.

Q Talk to the jury, please.

A They bring the pallet in to the square.

THE COURT: The question is whether that is usual. Listen to the question.

MR. LARSEN: I will rephrase the question.

MR. KENNY: Is the question withdrawn, the previous question?

MR. LARSEN: I will rephrase the question because

of the confusion we have had here.

BY MR. LARSEN:

Q Usually the angles are put on the long sides?

A On the long sides, yes.

Q On this occasion they were put on the short sides because you were cramped for space?

A Right.

MR. LARSEN: Thank you very much. I have no further questions.

THE COURT: Mr. Brady, do you have any questions?

CROSS EXAMINATION

BY MR. BRADY:

Q Mr. Romero, I understand you have been a longshoreman since 1961, is that correct?

A Right.

Q The date of this accident was 1968, is that correct?

A Right.

Q You didn't take any particular notice of the measurements of the various forklifts or hatch?

A No.

Q Or the size of the cartons?

A No.

Q You didn't really take any measurements at all, did you, sir?

A We are just regular longshoremen. Working men.

Q So whatever measurements you have given here today are more or less a guess, aren't they?

A Well, more or less. I can't say that two dimenions because the dimensions -- on the pallets I can say, you know, what I said just now to this, I said the pallets I know is four feet long, three feet wide.

Q You never measured any of those pallets, did you?

A You can see it by eye.

Q I just asked you if you measured them.

A All right.

Q Don't pallets come in different sizes, sir?

A Sometimes they used to come pallets in different sizes, square pallets.

Q Prior to the date of this accident, had you done this particular job before that time?

A Right.

Q Had you unloaded pineapples before that time, sir?

A No.

Q Had you unloaded prepalletized loads before that time?

A Yes. We unload a lot of pineapples.

Q Before the day of the accident had you made unloadings?

A I don't remember the day before the accident.

Q I am not asking the day before, but did you know this job, sir?

A Yes, I know it. Just our regular job, the longshoremens.

Q In your 14 years as a longshoreman--

A Now it is 14 years now.

Q 1968 I guess it would be about seven years, is that correct?

A Seven years.

Q In those seven years --

A Five years.

Q In those five years--

A After the five years I am working on the stringpiece. I work nine years, nine or ten years outside with the gang.

Q Let me just ask you the time you worked before this accident.

A I work at that time in the hold.

Q You had done this job before the day of this accident, isn't that correct?

A Right.

Q Do you understand what I said. You had done this particular unloading job?

A Yes.

Q In that manner some time before, isn't that right?

A Right.

Q You had handled prepalletized loads of pine-apples in the past before the day of this accident, isn't that right, sir?

A That's right.

Q And the members of your gang, they had done this job before the day of this accident also, hadn't they, on different ships?

A Yes.

Q The loads are always the same, were they not?

A Right.

Q Now, you know, sir, that it was your job to remove dunnage, is that correct?

A Right. What do you mean the job?

Q Your job on that ship that day.

A Right.

Q Was to remove dunnage.

A Yes,yes, that's right.

Q Is that pieces of wood that are stuck in at various parts?

A Right, if I see a piece of wood, this is the way I stay on top of the other half of the hatch in the square.

Q So at the time--

A This is the way I look at it. If there are pieces of wood, it stays on top, I take them off before they remove the pallets.

Q I understand that you started in the square of the ship and you worked your way towards the wings, is that the way the job was done?

A Right, after they cleared up the square.

Q I understand this accident happened about 12:30, is that right?

A Right.

Q So you had been working several hours in this way?

A Right. We worked right through to the hour, to our lunch.

Q At some time during that morning you had to bring down a Hi-Lo, is that correct, a forklift?

A After we cleaned the square.

Q Then the forklift has to work in a small space, is that right?

A Right.

Q Isn't it generally the purpose to put these drafts in the center of the square?

A Well, when they have the room to remove the machine in the wings, then they bring it to the square, right

in the middle of the square.

Q Sometimes they don't have that room?

A When we started to bring the pallets onto the wing, when we started under the coaming, it is just a very small room to turn the machine and catch the pallet and they bring it on the edge of the square and the coaming.

THE COURT: The coaming, are you saying?

THE WITNESS: The coaming. On the edge of the hatch.

Q You also said earlier that when it can't be hooked up the right way, you put chocks underneath?

A Right.

Q Did they do that that morning, sir?

A No, I don't do it. They do it.

Q I understand you didn't do it. It was not your job?

A Right.

Q But the hook up men, did they do that?

A Right.

Q They couldn't do it in the right way, is that right?

A In the right way.

Q Because there was no space?

THE COURT: Mr. Brady, you are interrupting the witness as he is talking.

A Because they don't have no room.

THE COURT: Just a moment. The reporter can't get this examination because you are interrupting the witness when he is talking and he is talking when you are talking.

MR. BRADY: Excuse me, your Honor.

THE COURT: Please don't talk when the lawyer is talking and please don't interrupt the witness.

THE WITNESS: I'm sorry.

MR. BRADY: Thank you.

THE WITNESS: You talk or I talk?

THE COURT: Put a question to the witness.

Q Now, this particular palletized load, it had already been lifted up by a forklift and brought to the side of the hatch, is that correct?

A On the square.

Q On the square, thank you. And nothing happened when it was picked up by the forklift, is that correct, sir?

A No. I don't see it. Nothing.

Q You know that this load initially was loaded by forklift also, isn't that right?

MR. KLONSKY: I object to that. How would he know how it was loaded in the Philippines.

THE COURT: Objection sustained.

MR. BRADY: I believe that was read into evi[illegible]

by Mr. Klonsky.

MR. KLONSKY: Not that he knows.

A I don't know.

THE COURT: He read the answers to the interrogatories not written by this witness.

Q Mr. Romero, in any event the man who picks up this load in the hold for the first time with the forklift, he has to do that the right way, doesn't he, sir?

A He no have no room to catch it the the right way.

Q But he still has to do his job correctly, doesn't he?

A Sometimes they do and sometimes they can't do.

Q Sometimes they can't do the job correctly?

A That is it. They can't do because they have no room.

Q If he has no room, he can't do his job right, is that right?

A I can't answer that question. If he don't have no room, I mentioned to you, if they don't have no room, they can't put --

MR. KLONSKY: Your Honor, may I object.

THE COURT: Just a moment, the witness is answering the question. If they don't have any room what?

THE WITNESS: They don't have no room to put

the draft in the position to hook it up. You understand what I am talking about.

THE COURT: What is your objection?

MR. KLONSKY: The question has not specified that this is the draft we are concerned with. They are talking generally at a different time.

THE COURT: I believe the question did indicate this particular draft. Read the question, please, Mr. Reporter.

(Read)

THE COURT: Apparenly it didn't unless it was earlier than that.

Q On this particular load, sir --

MR. KLONSKY: If your Honor please, will he please tell what this particular load is he is talking about. The one involved in the accident.

Q The load involving the accident.

MR. KLONSKY: The draft involving the accident.

MR. BRADY: All right, Mr. Klonsky, I will ask it that way.

Q On the particular draft involving this accident, was there very little room, sir?

A Yes.

Q So then the forklift man he didn't have much room

to do his job, isn't that right?

A Right.

Q And he has to do his job the right way, doesn't he?

MR. KLONSKY: Object to that, your Honor.

A I can't answer that.

MR. KLONSKY: When I object wait.

THE COURT: Yes, sustained.

Q Now, in addition to the forklift man and did you actually see this particular draft move on the fork by the forklift operator, did you actually see that being moved, sir?

A Right.

THE COURT: The draft?

MR. BRADY: Yes, your Honor.

THE WITNESS: Yes.

Q That was laid down on the side, isn't that correct?

MR. KENNY: That is a very indefinite question, your Honor. I think he has testified it was laid down in the square of the hatch, not on the side.

THE COURT: He can ask him now on cross-examination. Proceed.

Q Sir, didn't you testify earlier that when this particular draft was laid down it was laid down near the edge of the opening?

A Right because the machine they can't bring it right to the middle of the square.

Q They couldn't bring it to the middle of the square?

A Right.

Q So it had to be lifted up at some kind of angle, isn't that correct?

A No, not on the angle. They bring them down in the square on the edge, on the sides of the square. It is more out, there is nothing underneath the coaming. It is right out of the coaming.

Q In other words, this particular draft was not laid down in the center, it was laid down toward the edge?

A On the offshore center.

Q Thank you.

MR. KLONSKY: Offshore center.

MR. BRADY: He said offshore.

Q Then you say that -- and then the load was put down on the ground, isn't that right?

A Right.

Q And nothing happened then, is that right?

A No.

Q Nobody put more weight on it?

A No.

Q The weight stayed the same?

A It stays the same. The same pallet.

Q Then it had to be chocked up, you said, is that correct?

A Well, to hook it up, yes.

Q You said chocked.

A Yes, they put the chocks, we call them a platform.

Q In other words, when you can't do it the right way, you have to chock it up, isn't that what you said earlier, sir?

A No. I said they put the chocks on because without the chocks you can't put the bridles underneath the pallet. You can't hook it up.

Q Can you tell me who put the chocks on, sir?

A The guys they stay down there to hook it up.

Q Then they have to put the bridle on?

A Right.

Q You said the bridle was this aluminum bar?

A Angle.

Q Angle iron?

A Right.

Q That is done by the hookers, is that correct? The hookers --

A What do you mean the hookers?

Q Let me withdraw that question because it is

confusing. Can you tell me, sir, who puts the angle irons on the bridle? Who does that?

A Mr. Fernandez and the other Fernandez, the other one.

Q Then it has to be hooked up to something, is that right, sir? The bridle has to be hooked up to the line that comes down, doesn't it?

A No, the line is already hooked up on the top by the winches.

Q Don't they have to hook it up after they put the bridle on?

A They put the bridles on. They hook it up with a shackle and they put a shackle on and then they bring it to the hold to take the cargo out.

Q When they put the bridle on, is the load off the ground or on the ground?

A It is on the ground and they have got the hook for the winches are higher than a man to hook it up.

Q Now, these men that were putting the bridle on, they have to do it the right way, too, don't they?

A Sure.

Q If they don't do it the right way something might happen, is that right?

MR. KLONSKY: Objection.

A That's right.

THE COURT: Are you asking the witness for a conclusion. What is meant by the right way. Ask him what way they put them on. We don't know what the right way is.

Q Sir --

THE COURT: Ask the witness how it is put on.

Q Do you know how the bridle is put on, sir?

A Yes.

Q Would you please tell the court.

A I do it for ten years.

Q I'm sorry, I didn't hear that.

A I do it for ten years. I do this job for ten years to put the bridles onto the hooks into the machine, the winch. We said a winch. You know, the equipment for the ship,the machine.

Q Would you kindly tell the jury and this court how that is done, sir?

MR. KLONSKY: I object. I don't know what he means by that. If he is referring to this specific stow with this specific discharge, he should tell it to this witness.

THE COURT: Ask him if he recalls how it was done with respect to the pallet which broke.

How was the bridle put on, is that what you are

asking him?

MR. BRADY: Yes, your Honor.

THE COURT: Tell us how that was put on.

Q Let me ask him first if he saw it put on. Did you see the bridle put on this particular load, sir?

A On the draft.

Q On the draft that broke.

A Right, I see when they hook it up.

Q What were you doing when you saw this being hooked up?

A When they go up about ten feet high the pallet breaks in half and --

THE COURT: The question was what were you doing.

THE WITNESS: I am looking on top of the other cargo, the cargo that don't come out. I stay on top of the cargo to clean the dunnage is my job for that day.

Q How far away were you from the place where this was happening?

A I am on the other end into the hatch, the square.

Q How many feet is that, sir?

A I never measured. I don't know. You see, I can guess. You said before, I can't guess, I don't know how many feet.

THE COURT: You can give us your best estimate

as you recall it at this time.

A I'd say about 20 feet, not even 20 feet.

Q Now that load, that is lifted by somebody who is controlling a winch, isn't it, sir?

A Right.

Q That is another man?

A That's a man.

Q He has to do that the right way, too, doesn't he?

MR. KLONSKY: Objection.

THE COURT: We don't know what the right way is. Please don't ask the witness that again, Mr. Brady. Ask him what way it is done. We don't know what the right way is.

Q That has to be done by a winch man, isn't that right, sir?

A They do it, yes, that's right.

Q Mr. Romero, I know this happened in 1968, is that right?

A Right, September 1st.

Q When was the last time before today that somebody spoke to you about this accident?

A I don't remember.

Q You don't remember. Didn't somebody speak to you today about this accident?

A Yes.

Q Who spoke to you?

A The man, they told me, me and the other guy.

Q Excuse me?

A Me and the other witness--

Q Excuse me, I would like the witness to tell me. I don't want someone from counsel table.

THE COURT: The reporter didn't get the witness said. He used the word witness. That is all that was said.

A I mentioned the witness.

THE COURT: Why don't you ask him directly if he spoke to the plaintiff's counsel so he can understand the question. He has difficulty with the language. Ask the question directly.

Q Mr. Romero, if you don't understand my question--

A Yes, I understand. I just mentioned to you before who spoke to me before -- after the 1968, you know, to me all these things. Who spoke to me.

Q Yes, sir, I asked you that.

A Right.

Q Would you please tell the jury who spoke to you?

A Spoke to me the man that get hurt and the other witness and the lawyer. They call us to come over here for witness.

Q Did you sign a statement, sir, about what happened? Did you ever sign a piece of paper about what happened?

A Yes, we gave a statement to the lawyer.

Q To Mr. Klonsky, you mean?

A Right.

Q Have you looked at that statement yesterday or the day before?

A No, the statement, I don't remember when we give the statement. I don't remember the day or the month.

Q You don't remember looking at it even yesterday?

MR. KLONSKY: He said he doesn't remember when he signed it, when he gave it.

MR. BRADY: Will Mr. Klonsky produced it, please?

MR. KLONSKY: What do you need it for?

MR. BRADY: I asked you to produce it.

MR. KLONSKY: Yes, I will and I ask it be marked in evidence if you have any use for it.

MR. BRADY: May I read it first?

THE COURT: The witness is here to testify, Mr. Klonsky, I don't know why it should be marked in evidence. He is entitled to see it.

MR. BRADY: May I have a short recess, your Honor, to review it?

THE COURT: No, you can read it now.

MR. BRADY: May I have five minutes to read it, your Honor?

THE COURT: Yes.

(Pause)

Q Mr. Romero, when you say you saw this loading up, how many prepallitized loads were on this particular draft? Was it one or more than one, sir?

A One.

Q You are sure of that.

THE COURT: The question is are you sure of that?

A Yes. One draft go up.

Q Did you ever tell anybody that one draft went up eight feet higher than the other two drafts?

A No.

Q Let me ask you to look at this, sir, and see if it refreshes your recollection.

MR. BRADY: May I have a moment, please, your Honor?

THE COURT: You want the witness to look at that and see if it refreshes his recollection?

MR. BRADY: Yes, your Honor. Mr. Reid is reading it at this time.

MR. KLONSKY: I think the first question to pose to this witness is whether he can read English.

THE COURT: Is that written -- did you write that

statement?

THE WITNESS: No.

MR. KLONSKY: The last sentence is in Spanish, but the rest of it is in English.

A I can't write English.

Q Did you sign it, sir?

A Yes, I signed it.

Q You signed something in English, but you can't read English?

A I can write English and I can read English.

Q You can read English?

A Well, to read it for myself, you know, I can't read it for anybody.

Q Did you read this?

A Yes, I read it a little bit.

Q Did you understand it when you read it, sir?

A Some words, yes, and some no.

Q Were there any words you didn't understand?

A I don't know. I don't understand no words over there.

Q You didn't understand some of these words?

A Yes.

Q And this was made up by the attorney for the plaintiff, is that right?

MR. KLONSKY: I object to this, your Honor.

THE COURT: Made up.

Q Who wrote it? You didn't write it?

THE COURT: Let's find out how the statement was taken.

Q Would you tell us, please, where the statement was taken?

A Mr. Frank Valsano.

MR. BRADY: Is this gentleman from your office?

MR. KLONSKY: Yes, he is my investigator.

Q Did this gentleman identify himself as coming from the plaintiff's attorney when he asked you to give a statement?

A Right.

Q Where was this taken, sir, do you know that?

A I don't understand.

Q Was it taken in the lawyer's office or where was it taken?

A Yes.

Q In the lawyer's office?

A Right.

Q You had to go there and sit down in his office?

A Right.

MR. KLONSKY: Objection to "you had to go there,"

your Honor.

MR. BRADY: I don't mean he was compelled to go there.

MR. KLONSKY: I don't know what you are inferring.

Q You were requested to go to the lawyer's office, is that correct?

THE COURT: Did the lawyer ask you to come to his office to give the statement about the case?

THE WITNESS: Right. We met in a Spanish club in Newark.

MR. KLONSKY: A Spanish club in Newark.

Q Which was it, the lawyer's office that you just told the jury a moment or two ago or was it some place else?

A I just said.

Q I know you just told the jury a moment ago it was in the lawyer's office.

A I no understand that word before. I said it's in a Spanish club in Newark.

Q All right, so now it's in a Spanish club in Newark, is that right?

A Right.

MR. KLONSKY: Your Honor, I think all this cross-examination relative to where the statement was given should pertain only if the statement shows any contradiction.

If there are no contradictions why is he going into all this detail.

MR. BRADY: I have the right to go into the credibility of this witness, your Honor.

THE COURT: Is there something inconsistent with what he has testified to?

MR. BRADY: Your Honor, I have a right to go into this.

THE COURT: Mr. Brady, is there something in that writing inconsistent with the witness' testimony?

MR. BRADY: I would like to probe into that in my own way, your Honor. Yes, there is.

THE COURT: Pardon me?

MR. BRADY: I would like to probe into this in my own way.

THE COURT: You are limited to showing it to the witness and asking him whether he made that statement out of court prior to this proceeding and read it to him and ask him if he made that statement. If he can't read or if he can read, first show it to him and ask him if he can read. Show him the statement.

MR. BRADY: I don't mind showing it to him if he can read it. I thought your Honor asked me to probe into the fact of can he read. Your Honor asked me to look into

that.

THE WITNESS: I can't read it.

Q You can't read it. Would you look at it before you decide you can't read it.

A I can't read it. I can't read English.

THE COURT: All right. Point out the statement or read it to him now --

MR. BRADY: I don't want to read it to him, your Honor. He says he can't read.

THE COURT: You read the statement to him.

MR. BRADY: I decline to read something that is a self-serving statement that was not prepared by this man.

THE COURT: Let me clarify for the jury, Mr. Brady, the purpose of your using this statement. We don't ordinarily offer in evidence a statement made by a witness outside of court. The only purpose for which you can use this statement is to impeach the credibility of this witness by showing if you can that that statement contains some statement inconsistent with the testimony he has given here.

Now, that is the purpose and the limited use to which this statement may be put. Do you understand, Mr. Brady?

MR. BRADY: I understand, your Honor, but I don't agree with your Honor. I respectfully will object

to that. If your Honor wants me to read it, I will read it over my objection.

THE COURT: What is your view of the use of that statement?

MR. BRADY: Your Honor, I will read the portion which your Honor said.

THE COURT: What is your view as to how that statement can be used. I don't understand your objection. State your objection for the record.

MR. BRADY: I stated my objection, your Honor, that it is a self-serving statement made by someone who doesn't read by an investigator for the plaintiff's office.

I will read that portion if your Honor wants me to, I will be glad to.

THE COURT: You are limited to showing that he said something which is inconsistent. Is there something inconsistent in there?

MR. BRADY: Yes, your Honor.

THE COURT: Then ask the witness if he made that inconsistent statement. Read the statement to him and ask him if he made it.

Q Mr. Romero, I will ask you this: Did you make this statement --

A No.

Q Mr. Romero, you have to wait until I read it.

THE COURT: He is going to read a statement to you. The question is did you make that statement to the man who took the statement. What is your name, sir?

MR. VALSANO: Frank Valsano.

THE WITNESS: I understand.

THE COURT: He is going to ask you if you said that.

THE WITNESS: I understand now.

THE COURT: Just, do you understand now?

THE WITNESS: I understand. I'm sorry I said that word.

Q That portion would, your Honor "did" this is a portion, of course, your Honor understands that.

THE COURT: I didn't hear you.

MR. BRADY: I am reading that portion which your Honor --

THE COURT: Read it to the witness and ask him if he made that statement.

Q Mr. Romero, did you make this statement: "I saw as this top draft went up about eight feet higher than the other two drafts or about 20 feet from the floor of the ship, I saw the draft break and I saw the draft and the cartons of pineapples fall back down into the hold."

Did you ever say that, sir? Did you say that?

A Right.

Q Now there were three drafts, is that correct?

MR. KLONSKY: No, no.

A It was not three drafts. I said it is one draft that's over there. It's one draft that go up and they go for the other two drafts.

MR. BRADY: If your Honor will give me a moment. I had one other line of questioning.

Q Can you tell me, sir, what you did immediately after this accident occurred?

A What I do?

Q Yes, sir.

A Working.

Q Is that all?

A That's it.

MR. BRADY: No further questions.

THE COURT: Any redirect?

MR. KLONSKY: Firstly, will you mark this statement for identification.

THE COURT: Yes.

xx (Plaintiff's Exhibit 1 marked for identification.)

MR. KENNY: May I see it, Mr. Klonsky.

MR. KLONSKY: I want to redirect on this.

MR. KENNY: Can I read it since you have marked it for identification?

MR. KLONSKY: I will be glad to give it to you after I am through with it.

REDIRECT EXAMINATION

BY MR. KLONSKY:

Q The part that was read to you by Mr. Brady, you stated "I remember that three palletized drafts were brought out into the square." Who brought that out?

THE COURT: The question is is that what he said.

Q Is that what you said?

MR. BROADY: I did not read that to the witness, your Honor.

THE COURT: Show Mr. Klonsky the part you read.

MR. KLONSKY: Where did you read from?

Your Honor, I ask that in context I be able to read what I just read about three drafts.

THE COURT: That's what he read.

MR. KLONSKY: It was apparently before what he just read.

THE COURT: All right.

MR. KLONSKY: Thank you.

MR. BRADY: Respectfully except, your Honor.

Q I remember that these three palletized drafts

were brought out into the square. I saw Jose Fernandez and another man hook up the top draft with bridles. I saw this prepalletized draft start to go up. I saw as this top draft went up about eight feet higher than the other two drafts or about 20 feet from the floor of the ship. Is that what you stated?

A No, I said it is one pallet.

Q One pallet?

A One pallet.

Q Goes up at a time?

A And they go to prepare the other two pallets?

Q The other two drafts were still on the deck without any bridgles on them?

A Still on the deck. Just one pallet.

Q The way they hook up these bars to the pre palletized cargo, the bars that we talked about, the angle iron.

A Right.

Q Does it fit into the slot where the forklift goes into?

A Right.

Q The distance between the two pieces of wood, one layer and then another layer or does it go underneath the whole thing?

A Underneath the whole pallet underneath.

Q The way this draft was put on, the bridle was put on this draft, was there anything wrong with it?

MR. BRADY: Objection, your Honor.

Q Did they do it in the proper manner?

THE COURT: Just a minute. Your objection is what? What is the objection, I didn't get it.

MR. BRADY: The question was did they do it in the proper way and I know when I asked the very same questions there was a question which was sustained.

THE COURT: This is different. The question to the witness is was there anything wrong with the pallet that he saw, is that the question?

MR. KLONSKY: Or the manner in which they put the bridle on it.

MR. LARSEN: I will object to that, your Honor.

THE COURT: We can't ask the witness a question which calls for a conclusion as to whether something was right or wrong. The witness is to be examined. A specific question as to how it was put on, whether he noticed that there was something deficient or broken about the thing. That would be a proper question and, if so, tell us what it is.

MR. KLONSKY: All right.

THE COURT: Don't ask him whether it was right or wrong.

Q Let me ask you this and if you don't understand me, say you don't understand me.

The manner in which this draft was raised, did you see the draft with your own eyes?

A Yes.

Q Did you see anything wrong with the draft?

MR. BRADY: Objection, your Honor.

A No.

Q Did you see anything with the draft at that time?

A With the pallet, I see when they break it down, when it break in the middle, in half, you know, and the pallet split and all the cases they spilled out. This is the way they did.

Q You saw this?

A Yes.

Q When this split the way you say it was, what did you hear, if anything? Did you hear anything?

A What do you mean?

Q Did you hear anything at the time it split?

A Yes, I hear the break of the pallet, you know, and everybody started running. He no have no space to run and this is the case they bounce on top of the other two or

the other pallet let coming into the square. They bounce and this is the way they go down.

Q Did you hear something crack?

A Right.

Q Did you see something break?

A Right. Almost about eight feet high when I heard the pallet crack and break down.

Q Let me ask you this: At the time it was going up, was she going up at an angle or going straight up?

A Go straight up.

Q And the plumb line of this boom that was over the hatch, was it in the middle of the square or was it closer to the inshore side?

MR. BRADY: Objection. There is no foundation that he could see this.

A Closer to the shore side.

MR. KLONSKY: You see, your Honor--

THE COURT: No explanation. At this time we are going to take a 15-minute recess. The jury is excused.

(Jury left the courtroom.)

THE COURT: The witness is excused for 15 minutes. You can go in the witness room for 15 minutes.

(Witness left the courtroom.)

THE COURT: What is this explanation you are about

* * *

MR. REID: Very well.

THE COURT: Anything further of this witness? If not, the witness is excused. You may leave.

(Witness excused)

THE COURT: Is there another witness? If so, bring him in.

MR. KLONSKY: My next witness, your Honor, I call Mr. Alonzo Perry.

THE COURT: Do you want to get him.

MR. KLONSKY: This will not be with an interpreter, your Honor.

A L O N Z O P E R R Y, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KLONSKY:

Q Mr. Perry, have you ever spoken to me before?

A No, sir.

Q Have you ever seen me before?

A I wouldn't swear to it.

Q You wouldn't swear to it. Where do you think we might have met before?

A I don't think so.

Q You were called here to be a witness with respect

to an accident that happened on September 1, 1968, is that right?

A I didn't know what I was called for. I was subpoenaed and the gentleman just handed me a subpoena and said I was subpoenaed.

Q Do you know who subpoenaed you?

A At the time I didn't. I know now.

Q Who?

A Maher Terminal.

MR. KENNY: That is incorrect. We didn't subpoena him.

MR. REID: That's incorrect. Let the record show I subpoenaed him.

THE COURT: He was subpoenaed by the Chios Shipping Company.

Q We start off fresh, Mr. Perry, do we not with respect to your testimony. I have never talked to you and no one from my office ever talked to you and we never took a statement from you, did we?

THE COURT: Will you please answer orally so the reporter can get it.

A No.

Q No, you have never spoken to me before?

A Not that I know of.

Q That is what I meant by the question. Your "No" means everything I said was correct in my question, is that true? Please answer.

A Yes.

Q What do you do for a living, Mr. Perry?

A I am a longshoreman.

Q By whom are you employed?

A United Terminals.

Q On September 1, 1968, by whom were you employed?

A Macamar. Maher Terminal.

Q What kind of work did you do that day?

A I was a longshoreman. I did, you know, what was necessary to do at that time.

Q Did you operate a machine?

A You know, whatever was necessary to do, that is what I done.

Q Were you present when an accident occurred to a longshoreman on that day?

A Yes.

Q What were you doing at that time? Were you a hold man, were you a Hi-Lo driver, a signal man, which?

A It's been a while, you know. You know, when you work for a gang, you are capable of doing any job that is necessary to be done.

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Q But at the time of this accident what were you doing?

A I can say I was a laborer and a driver.

Q Were you operating a Hi-Lo?

A I did drive a Hi-Lo.

Q That day?

A If I remember I did drive a Hi-Lo.

Q Do you remember what you were using the Hi-Lo for?

A According to the records I read, we was working pineapples.

Q Working pineapples?

A Right.

THE COURT: You have no recollection, is that what you are saying?

THE WITNESS: It's been almost seven years.

Q Mr. Perry, did you give a statement to anybody in this case with respect to what you knew about the accident?

A You are speaking of what happened seven years ago.

Q Did you give an statement between the time seven years ago and today?

A Yes, my signature is on it.

Q You were shown your statement, were you not?

A Yes.

THE COURT: Can we find out when the statement

was taken.

MR. KLONSKY: Yes, I have it here.

THE COURT: You are asking whether it was taken immediately after the accident, Mr. Klonsky? The question was not very clear. You said between seven years ago and today.

MR. KENNY: September 11th.

Q September 20, 1968, I think it says. Did you give a statement on September 20, 1968, to some investigator?

A Yes, my signature is there.

Q This is your signature?

A Yes.

Q Did you read it before you came here today?

A I didn't read it all, no.

Q Did you read part of it?

A Yes.

Q How much of it did you read?

A I read -- let me see. I didn't get to this part.

Q With the court's permission can he read this to refresh his recollection before I pose further questions to him?

THE COURT: All right.

(Pause)

THE COURT: Just a moment. The question is having

read that, does it refresh your recollection as to what occurred back in 1968?

THE WITNESS: Yes.

THE COURT: Yes.

MR. KLONSKY: May I have the statement, please, sir.

Thank you.

Q On September 1, 1968,were you a Hi-Lo operator?

A Yes. I drove the Hi-Lo.

Q Did you see the accident that occurred to Mr. Fernandez?

A Yes.

Q Do you have any recollection now as to how much cargo had been discharged up to the time of the accident?

A Yes, I can tell you.

Q How much?

A You see, we was breaking in at the time. When we say breaking in, it was only, the square was being broken in, not too much cargo was being taken out of the hatch.

Q How do you break in?

A Generally they have pineapple slings, you know, to pull the drafts out. Then they put a chisel in the hold.

Q When you say chisel, you mean a Hi-Lo?

A Yes, they put a Hi-Lo in the hold to break out

the wings.

Q Is that what you were doing at the time this accident happened?

A Yes.

Q Do you recall how long you had been working in that hatch?

A You mean as far as time?

Q Yes, before the accident.

A I couldn't be truthful and tell you that now.

Q Tell me how you recall this accident happened; what you were doing and what happened?

A I remember distinctly that the pallet broke, you know.

Q What happened when it broke?

A A man fell.

Q Did any part of this thing that broke hit the man that you saw?

A It happened so suddenly and it's been so long a period of time.

Q I know.

A But, you know, the pallet collapsed.

Q You saw the pallet collapse?

A Right.

Q While it was on your blades or while it was

somewhere else?

A I couldn't swear to that now.

Q But you saw a pallet collapse and break?

A Right.

Q You saw a man fall down?

A You know, I saw the pallet collapse and break. Then I saw a man that was down.

Q Do you see that man here in court?

A It's been a long time.

Q You don't recognize him here?

A I left Macamar Terminal going on about seven years now.

Q You have left it?

A Macamar.

Q The man that was down, did you know him then?

A We just worked together, you know.

Q Was this a regular gang or a shape-up gang?

A I am in a regular gang. I was in a regular gang at that time.

Q That was your regular gang?

A Right.

Q The man that was hurt, was he part of your regular gang, too?

A I doubt it at that time.

Q But you saw something collapse, is that right, what was it that collapsed?

A The pineapple. The pallet broke, you know, split in two, you know.

Q What is a pallet that is used ordinarily by longshoremen?

A Excuse me?

Q Could you give me the dimensions of a regular pallet that you have on ship?

MR. BRADY: Objection.

THE COURT: Overruled.

MR. BRADY: Respectfully except.

Q Give us a description of a regular pallet.

A A pallet is about five feet wide and maybe seven-foot long, you know, and it has -- it is open.

Q There are two layers of wood, is that right?

A Right, one on the top and one on the bottom.

Q You can go in with your forklift into the opening between the two pieces of wood?

A Right.

Q Like a sandwich?

A Right. But let me express something now. A pineapple pallet is thinner than a regular pallet.

Q The wood is thinner?

A Right.

MR. BRADY. Objection, your Honor.

THE COURT: Excuse me, the question to you was tell us what a regular pallet is. Then we can get to a pineapple pallet.

A I think it is made of ship lap wood.

Q S-h-i-p?

A Yes.

Q Lath, what is that. How do you spell that?

A L-a-p.

Q But anyhow it is longer and wider and you say the wood itself is thicker than the pineapple pallet?

THE COURT: Ask him now to tell us what a pineapple pallet is.

Q Give us the dimensions of a pineapple pallet.

A A pineapple pallet is much smaller in size and it is thinner wood. The wood is, I think a regular pallet it may be an inch and a half thick and a pineapple pallet may be an inch thick.

MR. BRADY: I move to object on the ground that this witness is not competent to say what the dimensions are or what wood is far as the manufacture of any pallet.

THE COURT: See if you can find out how long he was employed as a stevedore.

Q How long before September 1, 1968, had you been employed as a longshoreman?

A Would you repeat that?

Q How long before the accident date of September 1, 1968, had you worked as a longshoreman?

A Two years.

Q How many years afterwards?

A Eight on to two, I have been there ten years.

Q You are still a longshoreman?

A Right.

Q Do you use pallets every day when you work?

A No.

Q Is it always there available?

A They are available, yes.

Q Pallets of the kind that the stevedores own, they are used over and over again, aren't they?

A Yes.

MR. BRADY: Objection, your Honor.

THE COURT: What is the objection?

MR. BRADY: Where are they used over and over and by whom?

THE COURT: We are trying to find out now.

Q The pineapple pallet, would you compare that to a regular pallet in size?

THE COURT: Just a minute. The question to the witness was or should be, since he is a stevedore, whether he uses pallets regularly. That is what you started to ask him. Would you give him a chance to answer. Do you regularly use pallets?

THE WITNESS: Not for the company I work for now.

THE COURT: In the ten years that you have been there, how often would you say you have used a pallet in your operation?

THE WITNESS: I have only been using pallets now for about, you see, after I left Macamar and I left Macamar in 1969, somewhere around there, we went to Atlanta Container Line and there we containerized. We didn't use pallet at all so I got away from pallets, see, and then I came back to what you call it as a laborer for another company and at this company we don't use pallets at all. Very seldom do we use pallets.

Q At that time around 1968 had you used pallets regularly before then while you were a longshoreman?

A At that time, right, 1968, we were using pallets.

Q And for two years before that you said?

A Right, from 1966 to 1968 I have used pallets.

Q I ask you to please compare the regular pallets that were in use then with the pallet that you saw break

which had palletized pineapple cargo.

A You can't compare them.

MR. BRADY: Objection.

THE COURT: What is your objection, I have to know what it is?

MR. BRADY: There is no basis for comparison, your Honor.

THE COURT: Overruled.

MR. BRADY: Exception, your Honor.

THE COURT: Tell us the answer to the question. Do you understand the question?

THE WITNESS: He is trying to compare the two pallets.

THE COURT: He wants you to tell us the difference between a regular pallet, as used in 1968, and the pallet which broke in this case. Do you understand the question?

THE WITNESS: On the pineapple?

THE COURT: Yes, on the pineapple. This was pineapple, wasn't it?

THE WITNESS: Right.

THE COURT: Tell us the difference between a regular pallet and the one which you saw break. Do you understand the question?

THE WITNESS: Yes. A regular pallet is thicker in dimension of wood, much longer and heavier.

A pineapple pallet is lighter in weight, thinner in wood and much smaller. It is two different types of wood they use. One is a cheaper--

MR. BRADY: Objection, your Honor.

THE WITNESS: And lighter.

THE COURT: Let the witness answer the question and then I will hear your objection.

THE WITNESS: One is stronger than the other one. The regular pallet is stronger.

THE COURT: You said something about the nature of the wood.

THE WITNESS: Right. See a regular pallet they use, the companies generally use, they may put anything on so they have to be strong so they use a better type of wood, a stronger type of wood. But a pineapple, the wood is so thin, you know, they just put pineapple on it so they use a cheaper type of wood which is thinner and smaller in size. When you hook up a pineapple, you know, you don't even hook it up the same. You can't even hook it up the same.

MR. KLONSKY: I have no further questions.

THE COURT: All right, Mr. Reid, do you have any cross-examination of this witness?

MR. REID: Yes, your Honor.

CROSS-EXAMINATION

BY MR. REID:

Q Mr. Perry, have you seen me before except a few minutes ago in the hallway?

A I think that was my first time.

Q Have you ever spoken to me about the facts in this case?

A I don't remember.

Q Did I ever show you your statement that was taken?

A No, sir.

Q I served a subpoena on you today to come down here and testify?

A I got a subpoena. I didn't know who it was from. The way the guy gave it to me.

Q This pallet that you picked up with the Hi-Lo, was that the first pallet on the stow when you moved it out?

A If I was breaking in, sir, two to one it had to be the top pallet. You know, it's been time, but when you are breaking in, you have got to break from the top.

Q That is what you were doing was breaking in from the top?

A I remember, you know, being in the hatch, you know, driving the chisel.

MR. KLONSKY: By chisel you mean forklist?

THE WITNESS: The forklift, you know.

Q They are called by various names, a Hi-Lo and a chisel and a forklist?

A It still means one.

Q It is still the same machine?

A Right.

Q When you say that you saw this person on the deck get hit, could you tell us whether or not he was knocked out?

A I couldn't answer that, you know, because when the accident happened,especially in a port, you know, people gather around and try to help and all you see is a person laying down there.

Q I call your attention to your statement that you made here and I will ask you whether or not this refreshes your recollection.

Fernandez fell down when he got hit. He was knocked out.

Does that refresh your recollection?

A I don't remember that. I don't remember what happened. You know was the man out or what. When I saw the man he was down and there was guys that was working with him, you know, they was around him and whatnot. It's

been time.

Q But you say that doesn't refresh your recollection?

A No. You know, I can't remember.

MR. REID: May we mark that as an exhibit, Mr. Klonsky.

THE COURT: That would be Defendant Chios Exhibit B.

(Defendant Chios Exhibit B marked for identification.)

Q Is this your signature, Mr. Perry, on this exhibit?

A Yes, that is my signature.

MR. REID: If the Court pleases, I would like to offer in evidence that portion of the statement which I have just read to the witness that it didn't refresh his recollection as a recorded recollection refreshed.

MR. KLONSKY: I don't think it is proper to offer it that way.

THE COURT: Past recollection recorded. The witness has been shown a statement or had the statement read to him. He says he does not recall it. He acknowledges that he made that statement in '68. Since he is not able to recall it, it is admissible.

MR. KLONSKY: There are other parts that should be

in context that I would like to have offered, too, at the same time.

THE COURT: It depends on whether he recalls it. Do you recall whether he read the statement I asked him having read the statement, does the statement refresh his recollection as to what happened in 1968 and he answered yes. Do you recall that?

MR. KLONSKY: Yes.

THE COURT: He is now asked a specific portion of it, which he does not recall, and as to that portion it is admissible as past recollection recorded. Overruled.

Is there any other objection?

MR. KLONSKY: I have another objection and I ask that parts of the statement be put in to be in context, if not the entire statement. I offer the entire statement.

THE COURT: You can't offer the entire statement. You have to show that there are other portions of that statement which he does not now recall. As to that part, it is admissible.

Let's proceed.

MR. REID: For the record, may I read that portion, your Honor?

THE COURT: All right.

MR. REID: Fernandez fell down when he got hit.

He was not knocked out.

MR. KLONSKY: I would like to get a stipulation as to whether he would read the next two sentences, which I wouldn't have to move for it.

THE COURT: No, you have to establish first that the witness does not recall that, Mr. Klonsky.

MR. KLONSKY: All right, I will do that.

MR. REID: No further questions.

THE COURT: All right.

MR. KENNY: Your Honor, I have no questions of the witness. However, I would like to offer the statement in evidence. The grounds for the admission, your Honor, is an aide memoire, as an aid to the memory of the witness. The witness testified that without the statement he had no recollection. Although the general rule of evidence is, your Honor, I believe, that --

THE COURT: We have gone through this, Mr. Kenny. We have established that as to a particular portion of it he had no specific recollection. If you want to find out whether he does recall, we can go through that.

CROSS-EXAMINATION

BY MR. KENNY:

Q Mr. Perry, do you recall where the pallet was when it collapsed? Was it in the air?

A I am not sure, you know. Can I give a not sure answer to the question by saying not sure?

THE COURT: Just tell us what you remember. You are called here to tell us what you remember of what occurred in 1968. If you do not remember, say "I do not remember." In which case he might offer your statement taken at that time in evidence, but if you remember, then we don't have to put the statement in. Do you understand?

If you don't remember, say I do not remember.

THE WITNESS: Okay.

THE COURT: What is the question to the witness?

Q Do you remember where the pallet was when it collapsed?

A No, sir.

Q It was in the number 3 hold of the Chios, is that right?

A No, sir, I can't even tell you the number of hold that I was in.

Q Without this statement, which has been marked as Defendant Chios Exhibit B, which you have read, Mr. Perry, do you have any recollection of this incident that you are called here to testify about today?

A I remember, you know, during that time when I first started as a longshoreman that I was in a hatch where

a guy got hurt very bad with the gang I was working.

Q Other than that you were working with pineapples?

A If I hadn't read that statement that I signed, I would be guessing.

MR. KENNY: I would like to offer this statement in evidence, your Honor, as an aid to the witness' memory. This is what his recollection -- he doesn't have any recollection without the statement, therefore, I think, sufficient foundation has been laid for its entrance. I offer it. Does anybody object?

MR. REID: There are a lot of things in the statement that he may remember something about if you asked him.

MR. KENNY: You object to the statement, Mr. Reid?

MR. REID: Portions of it.

MR. KENNY: I would like to offer it.

THE COURT: Let's see what portions you are objecting to.

MR. REID: All right, may I see it?

I will withdraw my objection, your Honor.

THE COURT: All right, let it be received.

xx (Defendant Chios Exhibit B received in evidence.)

CROSS-EXAMINATION

BY MR. LARSEN:

Q Mr. Perry, what time did you go down in the number 3 hold on September 1, 1968, do you remember?

A Only by the statement that I wrote down there. I don't remember offhand other than the statement.

Q Reading from your statement, a portion of it, Mr. Perry, on September 1, 1968, at about 12:30 P.M. I was driving a Hi-Lo in number 3 hold.

Does that refresh your recollection as to the time of the accident?

A Yes, I remember that.

Q How long had you been working in number 3 lower hold before 12:30?

A I don't know.

Q You couldn't go down there and operate a Hi-Lo until some part of the square of the hatch had been cleared away of cargo, isn't that right?

A That's right.

Q When you first went down, how much of the cargo was removed from the square so that the Hi-Lo could be driven on the deck?

A You answered it. You remove the square. Then they put the Hi-Lo down.

Q Was the entire square free when you went down with the chisel or the Hi-Lo?

A I couldn't answer that.

Q Did you have an opportunity when you went down in the hold to look at the cargo of pineapples to see them?

A You see, I worked for the gang. You are putting me somewhere else. I work for the gang. I am automatically in the hold at all times.

Q When you were down in the hold did you see the stow?

A I probably noticed it, yes.

Q Was the stow good?

A I can't answer. I don't know. I wouldn't answer that now.

Q Reading from your statement, Mr. Perry, does this refresh your recollection: The pineapple was three pallets high in stowage. The stowage was good.

A Yes, I read that, too. According to what I signed there, right, it was good, according to that. As far as remembering it --

Q Do you remember when you gave this statement, Mr. Perry?

A No, I don't. Only by just seeing it.

Q Would it be years ago that you gave this statement, do you think?

A Evidently, yes, it probably has been.

Q Do you think it is a fair statement that your memory of the facts when you gave this statement was clearer than your memory today?

A I am fair anyway.

Q Do you think when you gave your statement your recall of the facts was clearer than your recall of the facts today?

A I was inexperienced at that time plus I was excited because a man got hurt.

Q But the facts of the accident were fresher in your mind, were they not? They were more recent, were they not?

A What answer can I give to that?

THE COURT: Do you understand the question?

THE WITNESS: I understand the question, but, you know, like I have been on the waterfront now ten years. If the same thing occurs, maybe it could have been prevented--

THE COURT: No, the question he is asking you is whether you feel the facts as set forth in that statement back in 1968 your memory was fresher then than it is now.

THE WITNESS: But my knowledge--

THE COURT: He is asking about your memory.

THE WITNESS: I can't answer that.

MR. LARSEN: I have no further questions.

THE COURT: Any further cross-examination of this witness?

MR. BRADY: I have just a few questions, if your Honor please.

CROSS-EXAMINATION

BY MR BRADY:

Q Mr. Perry, have you ever assembled pallets yourself, sir?

A No, sir.

Q Have you ever purchased wood for pallets?

A No, sir.

Q Have you ever worked for any company that made pallets?

A No, sir.

Q Other than seeing the pineapple pallets were a little smaller in size, that's about the extent of your knowledge about the difference in pallets, isn't that right?

A Yes, sir.

Q You said a few moments ago to the jury at the time this accident occurred you were inexperienced. You mean in relation to the use of the forklift truck, sir?

A Inexperienced at being a longshoreman. You know only two years on the waterfront. I would say that is inexperienced.

Q That is not long enough to do your job well, is that correct, sir?

A That is long enough to learn the procedures of the job.

Q Did this accident happen, sir, as you were pulling a pallet off a tier?

A You got me stuck, you know. Or you are trying to stick me.

Q No, sir. If I may, sir, let me read from your statement and ask you if that refreshes your recollection. Let me read from your statement, sir, and see if this refreshes your recollection. At about 12:30 I picked up a pallet from stow. It was the top pallet. I raised the pallet on my blades and started to back up. I was about halfway clear of the next pallet below this one and the pallet on the blades split in half.

Do you remember that, sir? Can you tell me if you remember making that statement, sir?

A I signed that statement.

THE COURT: Do you remember it?

THE WITNESS: I don't remember that.

THE COURT: All right, he doesn't remember.

MR. BRADY: Thank you. No further questions.

MR. LARSEN: Your Honor, could I be permitted to

make one statement with respect to my examination of the witness. In reading this statement I said it was undated. It is dated September 20, 1968.

THE COURT: We established that earlier.

MR. LARSEN: I am sorry.

MR. KLONSKY: With the Court's permission may I read this entire statement to the jury. It is in evidence.

THE COURT: Is there any further examination of the witness?

MR. KLONSKY: I don't need him.

THE COURT: Thank you, you may leave.

THE WITNESS: Thank you.

(Witness excused)

(Mr. Klonsky read Defendant Chios Exhibit B to the jury.)

THE COURT: Do you have another witness?

MR. KLONSKY: I have depositions to read, your Honor, part of them.

THE COURT: All right.

MR. KLONSKY: I respectfully ask the Court to advise the jury what a deposition is.

THE COURT: Yes, as I told you earlier, ladies and gentlemen, in a case of this kind lawyers are permitted before trial to examine certain witnesses or submit questions

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to those witnesses which are answered under oath. They are also able to take the testimony of a witness under oath so that his testimony can be used here if the witness is unavailable for trial.

Mr. Klonsky is about to read to you testimony taken of certain witnesses under oath before trial who are not here to testify. Is that right?

MR. KLONSKY: Yes, your Honor. This was taken of States Marine Lines by one Peter Lantelme on May 14, 1974. All the parties except Dole Pineapple Company was there at the time.

MR. BRADY: Your Honor, I would submit that whatever was done at that time would not be binding upon my client.

THE COURT: That is true. The Dole Pineapple Company was not present at that so any statement made here or testimony given is not binding upon them.

MR. BRADY: We were not a party to any action at that time, your Honor.

THE COURT: I just explained to the jury that it is not binding on you as you were not present and not a party to the action at that time.

MR. KLONSKY: Mr. [illegible]eid conducted the direct examination as he had noticed this deposition.

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Starting on page 1, we will start with 3.

"Peter Lantelme called as a witness, having been duly sworn by the notary public of the State of New York, was examined and testified as follows:

Examination By Mr. Reid:

"Q In what capacity are you employed by States Marine?

"A Manager of the claims department.

"Q How long have you been manager of the claims department?

"A Three years or so.

"Q Who is your employer?

"A Iscoe former States Marine Lines."

Page 8, line 7.

"Q Where is the cargo stowage plan sent when the vessel is brought in and coming in with a load of cargo. Would it be from the last loading port to the first discharge port?

"A Each port makes up their own stowage plan and the last port makes a complete one.

"Q What was the last port of loading as shown on this cargo stowage plan?

"A Kobe.

"Q Japan?

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"A Japan.

"Q That is where this composite cargo plan was?

"A Yes, it seems to be."

Page 17, line 5.

"Q I notice on Defendant's and Third Party Plaintiff's Exhibit 3 for identification the cargo stowage plan in the number 3 hold of the Chios states that there were 370 pallets of pines. That means pineapples, doesn't it?

"A Yes."

I now offer in evidence the stowage plan pertaining to this last question which is marked 5 on my tentative list of exhibits.

MR. REID: No objection.

MR. LARSEN: No objection.

(Plaintiff's Exhibit 2 received in evidence.)

MR. KENNY: I have no objection to that going in evidence, your Honor.

THE COURT: There being no objection, let it be received.

MR. KLONSKY: Question line 11, page 17.

"Q What, if anything, did States Marine have to do with placing the pineapples on pallets?

"A Nothing.

"Q They came that way into the loading port?

"A Yes.

"Q Where would we obtain the information and from whom as to when and where these pineapple cartons were loaded on the pallets?

"A The Dole Pineapple people, Castle & Cook now.

"Q That would be in Dadiangas?

"A Dadiangas or maybe in San Jose. We have receivers in San Jose. Castle & Cook is in San Jose, California, and you may be able to get that information out there.

"Q Where is Dadiangas located?

"A In the Philippines some place. I don't know exactly."

Page 20, line 4.

"Q Has States Marine on a prior occasion carried prepalletized cartons of pineapple?

"A Yes.

"Q On how many prior occasions?

"A When they first started to palletize pines. They have been carrying pines for about 35 years. I guess they started to palletize them around ten years ago.

"Q Are you familiar with the pallets that they used for pineapple?

"A Well, in the Philippines they use, the pallets are made of Philippine mahogany and the cartons are glued

to the pallets and each other. There are, depending on the type of can, it could be anywhere from 72 to 126 cartons per pallet."

Mr. Kenny said: "64 to how many."

Mr. Klonsky said: "How many cans per carton?

"A Cans per carton.

"Q Yes.

"A There can be 6, 12, 24, 48, it depends.

"Q And you say glued to the pallet, glued to each other?

"A Yes.

"Q What do you mean glued?

"A They are glued. There is no latching or straps. There is a machine that swings a swab of glue across the pallet and they lay the cartons on top. One tier of cartons and they run another swab on top of that and they put another tier on top of that.

"Q How do they get loose at the discharge port?

"A They discharge them by pallets.

"Q When it is taken to a distributor how do they get the cartons?

"A They pull them apart, I imagine.

"Mr. Klonsky: By hand?

"The Witness: By hand I imagine. I think it is by

hand. I know they have a machine at Newark that pulls them apart to replace them, but I think they pull them apart by hand."

Mr. Reid continues:

"Q This machine you say pulls them apart to do what?

"A They pull them apart to replace damaged cartons."

There is a schedule of corrections in the back, page 22, lines 2 to 5. "It will pick up the sound cartons above any damaged one. Damaged carton is removed or replaced with a sound one. The sound cartons previously removed are replaced and the entire pallet placed in the Dole warehouse.

"Q Who maintains that machine?

"A Maher.

"Q Where?

"A At Newark."

Mr. Reid says "Is this a specially constructed type of machine?

"A Yes.

"Q They use glue over there at Newark with the machine, too?

"A Pardon me?

"Q Do they use glue over there at Newark with the machine?

"A No, I don't think so. The machine is really a Hi-Lo that has been revamped to use it. I think they call it a squeeze machine.

"Mr. Klonsky: That is to tear it apart?

"A Yes.

"Mr. Klonsky: The question is do they use any glue in Newark.

"A I don't know.

"Mr. Larsen: They reform the unit.

"Mr. Klonsky: They reform the unit without glue.

"A I don't know.

"Mr. Klonsky: You don't know?

"A I don't know about the glue.

"By Mr. Reid:

"Q And how long has States Marine been carrying these prepalletized cartons into Newark?

"A Well, whenever they started. I don't know, I am guessing, about ten years ago."

MR. LARSEN: There is a correction there, Mr. Klonsky, please.

MR. KLONSKY: Prepalletized is the correction.

"Q And how long has States Marine been carrying these prepalletized cartons into Newark?

"A Well, whenever they started, I don't know. I am

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guessing about ten years ago.

"Q To the best of your recollection?

"A Say 20 years.

"Q 20 years?

"A 20 years.

"Q That has taken them into the port in Newark?

"A Yes.

"Q Now you said that the pallet itself was made of Philippine mahogany.

"A On the pines from the Philippines, yes."

Let's go to page 30, line 12. Mr. Klonsky.

"Q This Hong Kong survey which I assume will be the next to be marked for identification as Exhibit 5."

Whereupon that document was marked in evidence--marked for identification and I offer this in evidence, particularly pages 7 and 8 which relates to the third hatch.

THE COURT: What is it you are offering, Mr. Klonsky?

MR. KLONSKY: It is a survey in Hong Kong prior to the time the vessel came to the United States.

THE COURT: It is attached to the deposition.

MR. KLONSKY: It is referred to in the deposition which I just read.

MR. LARSEN: No objection by States Marine.

* * *

AFTERNOON SESSION

2 P.M.

(In open court - jury present.)

THE COURT: Would you swear the interpreter first, Mr. Clerk.

(Anthony R. Amarante, interpreter, sworn.)

THE COURT: Now the plaintiff.

J O S E F E R N A N D E Z, called as a witness, having been duly sworn through the interpreter, testified as follows:

DIRECT EXAMINATION

BY MR. KLONSKY:

Q Mr. Fernandez, are you the plaintiff in this case?

A I am the plaintiff, yes.

Q When and where were you born?

A Sobrado de Paolo, Spain.

Q What is your date of birth?

A 1919.

Q What month?

A June.

Q How far did you go in school?

A Until I was 14 years of age.

Q When did you leave Spain?

A To come here?

Q Yes.

A I don't know. Maybe in 1962, but I don't know.

Q What kind of work did you do in Spain before you came here?

A I worked as a farm worker.

Q When you came to the United States, what kind of work did you first start doing?

A I don't remember.

Q When did you start working as a longshoreman?

A '63.

Q That is a year after you came to the United States?

A Yes.

Q Now, are you an American citizen?

A Yes.

Q When you first went to work in 1963, for which company did you work?

A For all of them.

Q Did you have a specific gang that you would shape up with when you worked?

A None.

Q In September of 1968 did you belong to a specific gang?

A Yes.

Q At the time that you had your accident, were you working with your gang or a make-up gang?

A Shape man.

Q Did you have an accident on September 1, 1968? That is what we are in court for now, isn't it?

A Yes, on the 1st of September.

Q Do you recall what happened that day?

A I can't remember everything because I can't remember other things as well.

Q Were you caused to be struck by something?

A Something struck my head. I broke my head, all this part of my head (indicating).

Q Were you conscious or unconscious after this happened?

A I recognized the people when I was on the top of the ship.

Q You don't understand my question. After you were struck by this object on your head where you pointed, were you unconscious or not?

MR. REID: I will object to that.

MR. KLONSKY: I withdraw the request.

Q What is the next thing you remember after you were struck on the head?

A That I found myself on the top deck of the ship.

Q Do you know how you got out of the hold? Yes or no.

A I don't know, but the people down there told me that they took me out, they took me out on the winch with something, but I don't know, I don't remember this.

Q Mr. Fernandez, please understand that I am only asking what you know, not what people told you.

A Okay.

Q Now, were you taken to a hospital after this happened?

A Yes, sir.

Q How did you feel between the time that you knew you were on the main deck to the time you were taken to the hospital?

A Poorly.

Q What was bothering you?

A My mind wasn't working well and I was bleeding and my head hurt me.

Q Which hospital did you go to?

A St. James.

MR. KLONSKY: I offer the emergency room record of St. James Hospital in evidence.

THE COURT: Any objection?

MR. REID: No objection.

MR. KENNY: No objection.

xx (Plaintiff's Exhibit 4 received in evidence.)

MR. BRADY: I have no objection.

(Mr. Klonsky read from Plaintiff's Exhibit 4 to the jury.)

Q Did you spend the first day away from the hospital after you got your emergency treatment?

A Yes.

Q A few days later did something else happen to you?

A I got up in the morning to go to work and my head in the area where they had treated me was blackened all over and I had various welts around the head. I did not permit myself to take my car. I then tried to get on the bus. When I went to get on the bus I then fell into the street.

Q How did you fall into the street?

A I lost the use of my sight at the moment. I couldn't hold on to myself and I fell at that instant.

Q Where was this?

A In front of my house on Welnort Street.

Q Was that while you were trying to go to work?

A Yes. I was going to work.

Q Do you recall what day this was?

A I am not sure. I think two or three days passed.

Q After the accident, two or three days?

A That's right, yes.

Q Before this did you go to work between September 1st and this time that you fell in the street?

A I did not go on any day, no.

Q How did you feel just before you fell in the street?

A When I got up in the morning and I tried to go to work, I felt all right then, but then I was going to go to the company to find out what they would tell me because at the hospital they told me within four days from today, come to the hospital here for your treatment. I then was going to go to work in the morning and then go to the office. I was going to go to the office to see if they were going to tell me something, some kind of a decision.

Q Let me ask you this: After you fell in the street what is the next thing you remember?

A I remembered nothing. I found myself in the hospital.

MR. KLONSKY: I offer in evidence the in-patient record of this plaintiff at St. James Hospital.

MR. REID: If the Court pleases, I would request that plaintiff subpoena the records from the hospital.

I can't read these.

MR. KLONSKY: When I take off my glasses I can see better than with them on. I will read them to him.

THE COURT: Those are copies.

MR. KLONSKY: The hospital sent copies, microfilm. I'm sorry for the quality of them.

THE COURT: Plaintiff's Exhibit 5, the hospital records.

Any other objection?

MR. KENNY: We haven't seen them. I would like to take a look at them. I question whether or not they are certified records.

MR. KLONSKY: We don't have any problem with that, do we?

MR. KENNY: I have no objection, your Honor.

MR. LARSEN: No objection by States Marine.

MR. BRADY: I have no objection.

THE COURT: The hospital records will be admitted.

xx (Plaintiff's Exhibit 5 received in evidence.)

MR. KLONSKY: I will just read the conclusion here.

(Mr. Klonsky read from Plaintiff's Exhibit 5 to the jury.)

MR. KLONSKY: I will have the doctor translate

these when he is on the stand, your Honor.

Q When did you next return to any kind of work?

A I don't remember.

MR. KLONSKY: Will you stipulate that he was out of work for 22-2/7 weeks.

MR. REID: I won't stipulate.

Q When you returned to work by whom were you employed?

A For the same company.

Q Did you do the same kind of work?

A I had to go home and I stayed home for about two months or more, I don't remember exactly how long because I was no longer able to stay with the gang.

Q When you came back to work, what kind of work did you do?

A I just stayed home. I do nothing at all.

Q Then when you went back to work, what did you do?

A That, at home.

Q You went to work as a longshoreman after 22-2/7 weeks, didn't you?

MR. REID: I object.

THE COURT: You have five people talking at one time. Just a moment. Would you read the preceding question, Mr. Reporter.

(Read)

THE COURT: What is the object?

MR. LARSEN: There is no agreement that he was out of work that long.

THE COURT: I can't hear more than one person talking at once and the reporter can't get it.

MR. LARSEN: There was an objection noted by Mr. Reid.

THE COURT: Mr. Reid, do you have an objection? If so, I will hear it.

MR. REID: There has been no proof that he was out of work 22-2/7 weeks on account of this accident.

THE COURT: The question to the witness was have you been out of work for 22 weeks, is that the question?

MR. KLONSKY: Yes.

THE COURT: Is there any other objection to that question?

MR. KENNY: I object to it as leading, your Honor.

THE COURT: Yes, objection sustained on the ground it is leading.

Q When you did go back to work eventually after the hospitalization at the St. James, what kind of work did you go to do?

A I could not go into my gang as a longshoreman. My

bosses put me to work in the house on the pier, extra labor.

Q Did you operate Hi-Lo's on the dock?

A Not that, no. Two or three months there and after that the boss of my gang said, come back to the gang, you have a permanent place, a job in the gang.

Q What kind of work have you done since then to the present day?

A Upon seeing that I was not able to work in the gang, I am working in the house, the pier house, in different companies.

Q Have you ever gone back to work as a hold man since the accident?

A No, no, sir, I never worked there again.

Q Up to the time you went back to work as a dock man, how did you feel?

A The truth of the matter is not entirely good, never.

Q What's bothering you?

A I have been walking around the house and going from side to side in and around the house. And in the hospital they took some liquid from my body. They took some liquid from my spine. They kept me there for 27 days.

Q Where?

A At the hospital.

Q Did you have a brain test taken while you were at the hospital?

A I can't tell you whether I had a brain test or not.

Q How do you feel today?

A I never feel well. My head bothers me.

Q What else bothers you?

A My back has never been the same. It's seven or eight years that my back has been bothering me.

Q What part of your back?

A In the middle of the spinal column where they took the liquid from.

Q What about your neck, have you any problems with that?

A When the weather changes or when the weather is in the process of changing, it then bothers me. If the weather is good, it doesn't bother me.

Q What is it that bothers you?

A I can't turn my head from side to side. This part of it seems to catch (indicating).

MR. KLONSKY: Indicating the right side of the neck.

Q What else?

A My eyesight, nothing happen to my eyesight fortunately, but at times if I am driving a car, my eyesight appears -- for about a half a minute or so it seems to get cloudy and I vomit particularly in the morning. Until 9 o'clock it sometimes happens two or three times.

Q When did you last vomit?

A It is less and it happens less often than it has happened up to a month and a half ago.

MR. KLONSKY: Can I now take Dr. Sherman out of turn?

THE COURT: Yes. There being no objection from the opposing parties, we will interrupt this examination of the plaintiff to accommodate the doctor who is present.

The plaintiff may step down.

MR. KLONSKY: This is out of turn.

(Witness excused)

MR. KLONSKY: May we state clearly for the record that the plaintiff was called solely to give a medical background and that the liability phase has not been entered into at this time and we will recall him for that purpose.

THE COURT: I just indicated to the jury that we are interrupting his examination to accommodate the doctor, there being no objection from the opposing parties.

MR. KLONSKY: Thank you.

THE COURT: He will be recalled.

MR. KLONSKY: Dr. Sherman.

H A R R Y S H E R M A N, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KLONSKY:

Q Doctor, are you a regularly licensed practitioner in the State of New York?

A Yes.

Q Without asking you a quantity of questions, can you give us the benefit of your medical background?

A I am a graduate of Yale Medical School 1934. I trained in surgery at the Lincoln Hospital, the Bronx, Hospital for Special Surgery in New York, the Post-Graduate Division of the New York University College of Medicine.

Licensed in New York State in 1935. During World War II, I spent four years in charge of various surgical installations for the Army Air Forces.

Since 1946 I have been in private practice in New York City specializing in general and traumatic surgery.

The term traumatic surgery meaning the treatment of injuries of all kinds.

At this time I am visiting surgeon, formerly

director, at Trafalgar Hospital, visiting surgeon at the Albert Einstein Hospital, visiting surgeon at Lincoln Hospital, consulting surgeon at various other institutions. I am a Diplomate of the American Board of Surgery and a Fellow of the American College of Surgeons.

I am associate professor of surgery at the Albert Einstein College of Medicine.

Q Doctor, at my request did you examine Mr. Jose Fernandez?

A Yes, sir.

Q When was that?

A I will refer to my records to refresh my memory. That was on February 3, 1975.

Q Was this with respect to an accident that occurred on September 1, 1968?

A Yes, sir.

Q Could you give us the benefit of your findings and conclusions that you made at that time?

A Surely. At that time in examining his head I found normal bone structure.

In examining his neck I found a loss of the normal cervical lordosis.

Q What is that?

A By that I mean that the forward curve of the neck

was no longer curved, but almost entirely straight up and down.

Q Is that spasm?

A It is the result of spasm. It is not spasm in and of itself.

I found that the muscles in the back of the neck were stiff. I found that on palpation, that is, when I pressed with my finger on various parts of his neck he was tender. He complained of pain on pressure over the entire cervical spine, that is the bony part of the neck, which I could feel with my fingers in the back and also over the stiff muscles in the back of the neck on both sides.

When I asked him to move his neck he could only move it through a few degrees in any direction. Normally the range of motion of the neck is quite large and every time he tried to move his neck he complained of pain and stopped moving.

When I attempted to move his neck further he complained of pain and so I stopped moving it.

I examined his shoulders and arms and I found that they were entirely normal.

I examined his trunk, that is his entire back, and I found that although he stood up straight and wasn't

twisted or curved, he was tender to palpation, again he complained of pain on pressure, over the muscles in the back on either side of the spine. They are called the paravertebral muscles in medical language.

When I asked him to move his trunk, that is to bend forward, backward and to the sides, he could bend it normally forward, but when he tried to bend it backward he could hardly do that because he said it hurt a good deal in the lumbosacral joint, which is the lower part of the back.

He was able to bend his back normally to the right side and normally to the left side. I then performed certain tests designed to see whether there is any irritation or damage to the nerves that leave the spine and go into the legs and I found that there was no such damage.

I then did a neurological examination which was essentially normal.

That is the extent of my examination.

Q What was your finding?

A My findings were that this man was suffering from a chronic strain of the muscles and ligaments and a chronic inflammation of the muscles of the back of his neck. When I say strain, I mean an injury to muscle which is caused

by a sudden stretching of the muscle which stretches it and tears small fibers of muscle.

I found the same strain of the muscles and ligaments of the lower back known as the lumbar spine on both sides.

I found that he had an aggravation and an activation, the term aggravation meaning that it was made worse and the term activation, meaning that a previously quiet condition was now made symptomatic or causing difficulty, a traumatic aggravation and activation, as I said, of a preexisting osteoarthritis of the cervical spine.

Osteoarthritis is rheumatism and it is a condition which develops with increasing age as a degenerative process in most people past age 40 and I found that Mr. Fernandez had a worsening, as I said, and production of symptoms of this condition as the result of an injury to his neck.

Finally, I found on the basis of what he told me about his symptoms and the accident that he was suffering from a cerebral concussion and a post-concussion state.

MR. REID: I object to that, your Honor. There is no foundation that has been laid for any such evaluation. He was not a treating doctor. He was the examining doctor.

MR. KLONSKY: If you will look at the hospital

records, perhaps that will be the answer to Mr. Reid.

Q Doctor, will you please look at these hospital records and particularly number 5, Exhibit 5, relative to his second admission to St. James. What is the final diagnosis of the hospital?

A The final diagnosis written on the front sheet sa[illegible]l. Post-traumatic cranial syndrome. This means a condition of the head resulting from injury to it.

Secondly. Laceration of the scalp. A laceration is a cut.

Third. Severe anxiety reaction. This is a nervous reaction.

Fourth. Cervical myositis, which is what I said I found when I examined him, namely, a chronic inflammation and irritation of the muscles of the neck.

Q You have looked at Plaintiff's Exhibit 5, the hospital record at St. James. Will you read to us the pertinent portions there related to his disability particularly the brain test that they gave him.

A Yes, sir. This man underwent an electroencephalogram on September 10, 1968. Electroencelphalogram is a test which is done by putting electrodes on the skull, connecting them up to a machine and recording the brain waves.

A doctor who specialize in this field know what is

normal and they know what is not normal. The result of the electroencephalogram done at St. James Hospital was, and I will read the last -- well, I will read the whole thing.

Dominant activity 10 circles per second, moderate amplitude alpha.

My interpretation, that has no great meaning.

Next paragraph. Some irregular wave focus bilateral temporal chiefly posterior temporal.

This means that there were abnormal brain waves in the back of the temples on both sides. I will indicate it on myself. That would be in the area I am pointing to with both of my fingers. Just about the ear level of the skull.

Q Before you leave that, is that where the lacerations were, the stitches?

A His lacerations were on the temporal area, which is at the same area.

The third paragraph, occasional generalized spikes. This is an abnormal finding indicating irritation of the brain.

The next line, moderately abnormal, this is an interpretation indicating that in the opinion of the electroencephalograph interpreter these tracings were not normal.

Lastly, generalized chiefly bitemporal, which means that the abnormality in the brain waves was all over the brain, but mostly on both sides of the head at the temple area.

Q What is the relationship between an EEG that is taken eight days after the accident and one that is taken six years after an accident. Which is more likely to show what has occurred?

A The electroencephalogram taken immediately or a short time after the accident is a much more reliable indicator of what occurred in the brain than one taken at some lengthy period like six years later.

Q Is there any reference in this record to a neurological condition that he suffered from?

A Yes, there is.

First of all, the final diagnosis of a post-traumatic cranial syndrome is a neurological diagnosis.

Then there is a neurological consultation by a Dr. Rinzler. These pages are not numbered, but it is a page in this Exhibit 5 which reads "Report of consultation from Dr. Lotman to Dr. Rinzler."

Dr. Rinzler details his findings and makes a diagnosis of laceration of scalp, concussion of brain, cervical myositis, severe anxiety reaction.

Q Are those the conclusions that you have come to also, is that correct, Doctor?

A Yes, sir, except for the severe anxioty reaction. I am not competent to make that diagnosis.

Q Is there anything there with respect to neurological signs for one day?

A Yes, sir. First of all, the entire hospital record, and I am speaking now of the progress notes written by the attending doctors, has numerous references to headaches, which is, of course, a neurological sign and symptom in somebody who has had a head injury.

Then on September 5th there is a note that the patient reports that he "loses" his sight from time to time. This intermittent loss of sight is a neurological symptom. I won't repeat the headaches every time I see them.

On September 11 there is a note which I will read. Electroencephalogram shows some slight abnormalities. Case discussed with Dr. Rinzler who feels patient has had slight brain contusion. Signed Peck.

Q What is a brain contusion?

A Well, a brain contusion is a bruise of the brain. It is a serious injury to the brain.

The usual injury to the brain caused by a blow to the head is a concusion. A contusion is worse than a

concussion.

On September 18th there is a notation that a spinal tap was attempted and was not successful.

A From then on to September 26th when he left the hospital I do not find any progress notes.

MR. KLONSKY: May I look at that for a moment, sir.

Q Look at this neurological note on the physical examination, the last one. What does that say?

A This is a report of the physical examination performed by the intern or resident when he entered the hospital. It says: Neurological--

Q I refer to the last one down here.

A Yes. Hyperreflexia, patellar and I think it says biceps. A trace of clonus is present. Hyperreflexia means that the reflexes caused by tapping the tendons, such as the knee jerk where the tendon is tapped just below the kneecap and the foot flips out, that these reflexes were more than usually active. This is a sign, wone of the signs of brain damage or irritation.

The clonus means that when the reflex was elicited by tapping the tendon, not only did the extremity jerk out, but it continued to vibrate back and forth. This is an abnormal sign and is an accompaniment of brain damage.

Q This very first --

A The very first line I didn't read because I cannot make out one symbol here.

Q It is tremors.

A But I don't know what this is. There is a symbol here that looks like a zero with a line after it. Whether that means none or whether it has some other meaning I don't know. At any rate, it says tremors of four extremities.

Q They wouldn't say anything unless there was a tremor there, would they?

MR. BRADY: Objection, your Honor.

A I don't know what they would say. I can only read what it says.

Q Doctor, please assume that prior to September 1, 1968, the plaintiff who was working as a longshoreman for a number of years, no history of prior brain damage, able to perform the work of a hold man where you do the pulling of cargo and have to use your ultimate strength as compared to dock jobs that they have for longshoremen was caused to sustain an accident on September 1, 1968, which kept him out of work for a period of time, a substantial period of time with the complaints and the findings which you have noted, being treated by a Dr. Lotman for a period and by reason of being struck about the head and body on falling

pineapple cans and cartons, was caused to lose consciousness for a short time and he next found himself on deck and then was taken to the St. James Hospital emergency where they took three sutures in the parietal region of his head and discharged.

Three or four days later on the 4th of September he passed out in the street, was taken back to St. James Hospital where he remained as an in-patient for approximately seven days with the positive electroencephalogram and positive neurological findings that they made and which you read.

That he now has complaints that limit his work capacity only to dockside and he does have headaches and he does have limitation in the use and function of his body as compared to how it was before this accident.

Now, sir, do you have an opinion based on a reasonable degree of medical certainty as to whether the accident of September 1, 1968, was the proximate cause of his complaints and disability?

A Yes, I have an opinion.

Q What is that opinion, sir?

A My opinion is that it was.

Q That it was?

A It was the proximate cause of his complaints and

disability.

Q Do you have an opinion based on the same facts as to permanency?

A Yes, I have.

Q What is that, sir?

A My opinion is that the condition which he presented when I examined him is permanent.

Q Is that consistent with the condition he had at the hospital?

A It is.

Q And these findings were made thereafter?

A It is.

Q Do you have an opinion as to his work capacity in the future?

A Yes, I have.

Q What is that, sir?

A My opinion is that he cannot do any work which involves standing on heights or very strenous activity.

Q Can you state this with a reasonable degree of medical certainty?

A Yes, sir.

MR. KLONSKY: Your witness.

CROSS-EXAMINATION

BY MR. REID:

Q Dr. Sherman, do you often testify in court?

A Yes, sir.

Q How many times would you say you testified in court a month?

A About four or five times.

Q That would be about 48 times during the year or more than that?

A No, it comes to about 30 or 35 times a year.

Q You testified mostly on behalf of the injured party?

A Mostly, but also on behalf of defendants.

Q Do you charge a fee for the examination?

A Yes, sir.

Q You also charge a fee for coming into court to testify?

A Yes,sir.

Q What are you charging the plaintiff today to testify?

A $75 an hour.

Q When you come into a court on other occasions and testify for plaintiffs, do you get paid then?

A Yes, sir.

Q Would you say you are a professional witness, Doctor?

A No, sir.

Q If I gave you $10, would you testify for me?

A For you, Mr. Reid, I would testify for less.

MR. REID: Very well.

Q Doctor, I have just been given your report, dated February 7, 1975. I haven't seen it before. I am shown some hospital records here that I can't read.

MR. KLONSKY: I don't think that is a part of the question, your Honor.

Q But I am going to --

THE COURT: Are you putting a question to the witness or are you just making comments as you go along, Mr. Reid.

MR. REID: Strike it out of the record.

Q Let's go to your examination, Doctor. I see that you gave this patient of yours, this plaintiff, several orthopedic tests and you stated I believe in your report that straight leg raising, Lasegue and Patrick test were bilaterally negative. What is a straight leg raising test?

A That is a test which is done to determine whether there has been any irritation or damage to the nerves leading from the lower back and going into the legs.

Q What about the Lasegue test?

A That is a similar test with the same purpose.

Q And the Patrick test?

A The Patrick test is a test to determine whether there has been any injury to the sacroiliac joint or to the hip joint.

Q You found all of these tests to be negative?

A I did.

Q By negative you mean normal?

A Yes, sir.

Q In connection with your further examination of this patient, I see here that the lateral flexion is carried through a normal range on each side. What is the lateral flexion test?

A Well, I did lateral flexion tests in two areas, sir. One in the neck and one in the lumbar spine.

Lateral flexion means bending to the side.

Q They were within normal range?

A Yes, sir.

Q What is a flexion test? I am referring now to the trunk.

A Flexion means forward bending.

Q Bending over to pick up a piece of paper off the floor?

A Yes, sir.

Q You found that to be normal?

A I did.

Q I believe you said that the extension was limited a few degrees. What is an extension test?

A Extension is bending backwards.

Q That can vary from individual to individual, can it not, Doctor, depending upon the lordotic curve?

A It may vary slightly from individual to individual.

Q We are not all built alike?

A No, sir.

Q We don't all have the same amount of extension?

A We don't.

Q Looking further at your report, Doctor, on page 3, I call to your attention that neurological survey revealed cranial nerves apparently normal throughout.

Could you explain that to the jury?

A Surely. There are 12 nerves that leave the brain through openings in the skull and they are called cranial nerves. Four of them control vision and movements of the eyes. One controls the sense of smell, One controls the sense of taste and another controls movements of the muscles of the face and neck, another controls sensation of the face. One of them controls the activity of heart, lungs, stomach and intestines.

Another one controls movements of the tone. One

controls movements of the trapezius muscles, which are muscles that shrug the shoulder as I am doing now and, finally, there is one nerve that controls hearing and balance.

In the indication of Mr. Fernandez I found that all of these nerves appeared to be normal.

Q Referring again to your report in which you say deep tendon reflexes are equal and active in both upper and lower extremities. Would you tell us what they are in connection with the upper extremities first?

A In the upper extremities there are three reflexes which are commonly tested for and which I tested for. They are the reflexes of the biceps muscle by tapping the biceps tendon the arm jerks up.

The reflex of the triceps muscle. By tapping the triceps muscle in the back of the arm, the arm straightens up.

And the periosteo radial reflex. By tapping the thumb side of the forearm, as I am doing here, the hand jerks up.

They were normal.

Q Tell us about the lower extremities deep tendon reflexes.

A In the lower extremities there are two which are generally performed and which I did.

One is the knee jerk or the patellar reflex, which is done by tapping the tendon just below the kneecap when the knee is bent. When this is tapped the leg flips forward.

The other one is done by tapping the Achilles tendon or the heel cord. When this is done the foot flips downward. I did them both on Mr. Fernandez. They were normal.

Q I believe you referred to the hospital records and I think you read from the records that there was some abnormality to the deep reflexes.

A Yes, sir.

Q You said that would indicate brain damage?

A Yes, sir.

Q But you didn't find any damage to the deep reflexes?

A I did not.

Q I believe in your neurological examination you said that there are no sensory defects. Could you tell us what that is?

A That means that sensation was normal over all the areas which I tested. I used a pin and I used a wisp of cotton and Mr. Fernandez was able to feel everywhere that I touched him with these two things.

Q Some time in an anxiety reaction you get something

which may be positive as a result of those tests?

A I beg your pardon. I didn't hear your entire question.

MR. REID: Would you read the question?

(Read)

A I don't understand your question now that I have heard it, Mr. Reid.

Q You make these tests to see whether or not the nerves or the sensation is impaired in the area. That is tested, whether it is the arm or the leg or the trunk.

A Yes, sir.

Q Sometimes these things have a relation to an anxiety reaction?

A It is possible.

Q What is a peripheral vascular examination?

A That is an examination of the pulses of the arms and the legs and the feet and an examination to see whether there is anything obviously wrong with the veins of the legs.

Q You found that to be normal?

A I did.

Q You speak about the cervical paravertebral muscles. You said it was quite stiff.

A I did.

Q That can be simulated, can it not, Doctor?

A No, sir, that cannot be simulated.

Q Can that be the result of an anxiety reaction?

A No, sir, it would not.

Q You speak of tenderness that you found over the cervical spine. That is a subjective complaint, isn't it, Doctor?

A It is both subjective and objective.

Q You wouldn't know about it unless the patient told you, would you?

A I would know about it from being told by the patient and from observing his reactions when I pressed, which would be an involuntary withdrawal. When I say that there was tenderness to palpation, I mean that both of those conditions existed.

Q Withdraw may be a voluntary reaction, too, can it not?

A I suppose it could.

Q You doctors talk about subjective complaints and objective findings.

A We do.

Q An objective finding is something you can look at a person and see?

A Yes, sir.

Q It is like we talk about a contusion or laceration,

that would be an objective finding?

A It would.

Q But when you get inside the brain, you can't see inside the brain, can you, Doctor?

A I couldn't see inside of Mr. Fernandez's brain, if that is what you mean, sir.

Q You didn't run any brain scans?

A No, sir.

Q Or electroencephalograms?

A No, sir, I did not.

Q Can various measurements being made by a doctor also depend upon the willingness of the patient to cooperate, does it not?

A Well, that depends upon what measurements you have in mind, sir.

Q Say the cervical spine. For instance, you tell a patient to turn his head to the right or to his left or up and down. That is a voluntary movement, isn't it?

A Yes, it is.

Q And it could be stopped short?

A It could.

Q I believe you also examined his shoulder girdles and the upper extremities.

A I did.

Q And you found him to be normal in contour throughout?

A I did.

Q You found no muscle atrophies by inspection or measurement by circumference. What does that indicate, a lack of atrophy, Doctor?

A It means that the muscles of his shoulders and arms were normal.

Q That meant that he had been using his shoulders and arms, doesn't it?

A Yes, sir.

Q You have yourself encased or your arms restricted for a period of time, you will get atrophy, will you not?

A Generally speaking, you will.

Q All of his joints and the upper movements were in range of his shoulder girdle and extremities were within normal range, were they not?

A They were.

Q You notice in the hospital record, Doctor, that the X-rays of the head were normal.

A I did.

Q That indicates that there was no fracture?

A That is what it indicates.

Q Did you see any reference in the hospital records

to a hematoma of the brain?

A The word hematoma does not appear in the hospital records.

Q What is a hematoma, Doctor?

A A hematoma is a blood clot or a collection of liquid blood depending upon how it is used.

Q You can have that as a result of a contusion of the brain?

A One can have it, yes.

Q Did you inquire of this plaintiff when you examined him as to what had been the nature and extent of his work and activities since he returned to work?

A Yes, I did.

Q What history did he give you as to the type and nature and extent of work?

A He told me that when I saw him that he was working as a Hi-Lo operator.

Q That is like a truck driver, isn't it?

A Well, a Hi-Lo is a rather small thing. It is not nearly the size of a truck. It runs on the pier and picks things up and puts them down.

Q Have you ever driven one, Doctor?

A No, sir.

Q Do you know whether it can turn within a small or

large radius?

A I am afraid I am no expert on Hi-Los, Mr. Reid.

Q It takes a certain amount of reflex ability to drive one of those trucks?

MR. KLONSKY: Objection, your Honor.

Q If you know.

A I don't know anything about a Hi-Lo other than what I have seen.

Q Would you call that -- what type of work would you say that was, light work or moderate work or what?

A I'd say that was light work.

Q Light work?

A Yes, sir.

MR. REID: I have no further questions.

THE COURT: Mr. Kenny.

CROSS-EXAMINATION

BY MR. KENNY:

Q Doctor, do the hospital records indicate any fracture?

A No, sir.

MR. KENNY: That is all.

MR. LARSEN: I have no questions, your Honor.

CROSS-EXAMINATION

BY MR. BRADY:

Q Doctor, did you take any X-rays of this man?

A No, I did not.

Q Do you have an X-ray machine, Doctor?

A No, sir.

Q Doctor, what is your basis for saying that the plaintiff has osteoarthritis?

A A review of the X-rays which were taken elsewhere.

Q You took no X-rays?

A I did not.

MR. BRADY: Thank you, no further questions.

REDIRECT EXAMINATION

BY MR. KLONSKY:

Q Doctor, in your review of the records pertaining to this man, you found he was treated by a Dr. Lotman, is that true?

A I did.

Q Did you note what Dr. Lotman wrote with respect to his return to work and when he could go back to work?

A Yes, I did.

Q What is that?

A Just a moment, sir, I will check my records and tell you.

Q Page 2, Doctor.

A Dr. Lotman found -- had the opinion that this man

would be able to return to regular work on February 4, 1969?

Q February 4, 1969?

A Yes, sir.

Q That is about 22 weeks after September 1, 1968, isn't it?

A Yes, it is. A little bit more, as a matter of fact.

Q Let me ask you this, Doctor. Can you X-ray the brain and get a picture?

A Only by the use of certainly highly specialized techniques. The ordinary X-ray of the head does not show the brain.

Q The brain, when you damage any part of the brain, does it regenerate?

A No, sir.

Q Can that area of destruction be the subject of another electroencephalogram would be negative?

A As times goes on the area of the brain which has been destroyed becomes scarred over and as the scarring increases in amount, the electroencephalogram abnormalities decrease in amount so that as time goes on the same patient who had an abnormal electroencephalogram shortly after the injury would develop an electroencephalogram that would be more and more normal as time went on.

Q Does that mean that the area of injury has improved?

A It does not.

Q In other words, there is some sort of cover up of the brain cells?

A The brain has the capacity for shifting the activity of the brain from one area to the other. An injured area loses the activity and it goes to another area, but the injured area remains injured forever. The brain cells, once they have been damaged, do not grow back.

Q Let me ask you this, Doctor. On the 4th of September he fainted in the street and blacked out. What is that indicative of in this man's case?

A In this man's case--

MR REID: I object unless he lays a proper foundation. Your Honor, this man says he is an orthopedic man and a surgeon.

MR. KLONSKY: That doesn't mean he can't testify to simple medical questions.

THE COURT: Is it in that area. Is that what you are suggesting?

MR. KLONSKY: Yes, your Honor.

THE COURT: All right, you can answer it.

A In this man's case, and I base my answer on a

review of his hospital record, since there was no other finding in the entire hospital records of any other condition that would cause a blackout, I conclude the blackout was caused by the brain damage suffered in his accident of a few days prior.

MR. KLONSKY: Thank you, Doctor, that is it.

RECROSS EXAMINATION

BY MR. REID:

Q Doctor, when you examined Mr. Fernandez, did you take his blood pressure?

A I did.

Q How did you find it to be?

A His blood pressure was 144 over 94, which is slightly high in the diastolic range, but within normal limits.

Q High blood pressure could cause a temporary blackout, couldn't it, Doctor?

A A very high blood pressure can cause one, but he did not have it when he was admitted to the hospital.

Q Blood pressure various from individual to individual, does it not, Doctor?

A They do.

Q What may be a high blood pressure for one person may be alow blood pressure for another?

A No, that is not so. They do vary, but they vary within what is medically called a range of normal and high blood pressure has a certain range which can never be considered low for anybody.

Q What I mean is, take this example, Doctor. Did you give him a series of tests for his blood pressure to determine whether or not he had a normal range?

A Mr. Reid,blood pressure falls into a normal range. The blood pressure of anyone individual is either within the normal range or not.

Speaking on the basis of medical knowledge, I would say that the blood pressure that Mr. Fernandez presented at my office was within a normal range.

Q Wouldn't a cardiologist, Doctor, take a series of tests for the blood pressure before he would make a determination as to whether or not that person had what he may consider as a cardiologist to be a normal range based upon further examinations which a cardiologist might perform?

MR. KLONSKY: Objection.

THE COURT: What is the objection?

MR. KLONSKY:What does a cardiologist have to do with this case. This other person he is talking about which is not the plaintiff. He is not specifying this

plaintiff, the records in this case and I respectfully submit that he is going far afield and not within the confines of my redirect either.

THE COURT: What is the relevance, Mr. Reid, of what a cardiologist might do?

MR. REID: I just wanted to show, your Honor, that there may be one or more causes for a blackout rather than the history that the plaintiff may have given to this doctor. I am exploring the possibility here that a man's blood pressure may have something to do with it.

THE COURT: I think you can put that question to the doctor. I think you have asked the doctor whether it is possible for high blood pressure to cause a temporary blackout and I believe he has answered that. Where are we going from there?

Q Mr. Klonsky asked you about certain tests that you would make concerning the brain and you said that you X-rayed the brain and you couldn't tell what was on the inside of the brain. Isn't that called an angiogram?

A Of course there is.

Q There is a test also called the pneumoencephalogram?

A There is.

Q You didn't perform either of those tests, did you, Doctor?

A No, sir. They are done as part of a hospital admission. They are not done in doctor's offices.

Q You didn't make any recommendation, I see no recommendation in your report, Doctor, that you ask that those tests be performed at any hospital?

A I did not make such a recommendation.

Q You have talked about an abnormal electro-encephalogram. You noticed in the hospital records, Doctor, didn't you, that the encephalogram showed a questionable positive indication of cerebral injury. Did you see that, Doctor, in the hospital records?

A I don't recall those words. May I see it again? I will be glad to refresh my memory.

Q Yes.

A Yes, I see that notation in the final summary sheet.

MR. REID: Thank you, Doctor. No further questions.

THE COURT: Anything further?

MR. KENNY: No, your No, your Honor.

MR. BRADY: No, thank you, your Honor.

REDIRCT EXAMINATION
BY MR. KLONSKY:

Q The earlier report you read, was that signed by a doctor?

A It was.

Q Who was the person they gave him to to perform this procedure?

MR. BRADY: I don't think there is any basis for that, your Honor.

Q Do you know who wrote the final summary?

A No, sir.

Q Is there a name here?

A The final summary is written by Dr. Peck.

Q Would you look at the electroencephalogram and what was the name of that doctor?

A The electroencephalogram is signed -- just a moment -- by Dr. Rinzler who was the neurologist.

Q You know him as a neurologist, Dr. Rinzler?

A I have heard his name mentioned as a neurologist, yes.

Q His report, does that say anything about a question about the electroencephalogram?

A His report does not say that.

MR. KLONSKY: That is all.

RECROSS EXAMINATION

BY MR. REID:

Q You found what I pointed out to you in the final summary, didn't you, Doctor?

A Yes, I did, sir.

* * *

(In the presence of the jury.)

THE COURT: All right.

P E T E R L A N T E L M E, called as a witness, having been duly sworn, testified as follows:

MR. LARSEN: May I submit, your Honor, that the testimony of Mr. Lantelme is about to given on behalf of the ship owner Chios and Marine States Lines in its cases.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. REID:

Q Mr. Lantelme, are you here under subpoena today?

A Yes, I am.

Q In September, 1968, by whom were you employed?

A States Marine Lines.

Q In what capacity?

A Cargo claims manager.

Q I have documents here that I will ask you to identify, but before I ask you to do so, in connection with the vessel the Chios, were you familiar with voyage number 5?

A Yes.

Q Is that called a Far East voyage?

A Inbound voyage, 5 in, from the East East to the

United States.

Q Is there any custom and practice of States Marine in connection with surveys and loading of cargos in the Far East destined for U.S. east coast ports?

A Yes, there was.

Q Could you tell us what that practice was?

A We hired a surveyor to survey the hatches before loading, continue to survey during loading and make his comments subsequent to loading at each port of call and I believe they took photographs at each port also.

Q Was that procedure in the regular and usual course of business of the company?

A Yes, it was.

Q These survey reports, did you require that they be sent into the New York office?

A Yes, they were.

Q Was that done in the regular and usual course of business?

A Yes, they were.

Q You received them in the regular and usual course of business of the company?

A Yes, sir.

Q And these surveyors were engaged in the regular and usual course of business?

A Yes, sir.

Q That was the regular and usual course of business?

A Yes, sir.

Q I will ask you whether or not you can identify this document, Mr. Lantelme.

A This is the time charter party between the vessel owner Chios Shipping, Limited, and States Larine Lines, the charterers.

Q What is the date of that one?

A March 1, 1968.

Q I show you another paper and ask you what that is.

A This again is a time charter party between the owners, Chios Shipping Company and States Marine Lines, charterers.

Q That charter there covers voyage number 5?

A Yes. It is dated June 12, 1968.

MR. REID: I would like for these to be marked as one exhibit.

THE COURT: That would be Defendant Chios Exhibit C.

(Defendant Chios Exhibit C marked for identification.)

xx

Q I will show you another paper with attachments and I will ask you whether or not you can identify that paper.

A This is the survey report held at Dadiangas and

Manila in the Philippines.

Q That is one of these reports that you referred to that is made in the regular and usual course of business?

A Yes.

MR. REID: I offer that in evidence.

MR. BRADY: I object, your Honor.

THE COURT: There being no objection --

MR. BRADY: I did place an objection.

THE COURT: What is your objection?

MR. BRADY: As to the survey report, your Honor, it was prepared by some independent contractor who is not an employee of the United States and therefore would not be a record kept in the course of business of U.S. Lines.

THE COURT: He is not an employee of the United States, States Marine.

MR. BRADY: As far as States Marine, the person who made the so-called report was not an employee of States Marine. It was some independent contractor and it would not be in the course of States Marine's business to keep this particular record or to make it.

THE COURT: What do you say to the objection, Mr. Reid?

MR. REID: He has testified, your Honor, this was the custom and procedure of the company to handle their Par

Eastern business in this way and that is the way they performed their charter business. They hired the ship, they got the surveyor to go there and take care of the cargo and see that the cargo was loaded and to take the photographs, to see that everything was performed.

THE COURT: And send a report to the New York office?

MR. REID: Yes.

THE COURT: Overruled.

MR. BRADY: Respectfully except, your Honor.

xx (Defendant Chios Exhibit D received in evidence.)

THE COURT: What is the date of that report, Mr. Reid?

MR. REID: The date of the report is July 11, 1968, at Manila, with a covering letter dated July 23, 1968.

Q Referring to this Exhibit D, I see that the covering letter is signed by International Harvester MacLeod, Inc. Who are they?

A They are our agents in Manila.

Q I will show you a further paper and ask you whether or not you can identify that paper.

A This is a similar survey held at the port of Keelung in Formosa.

Q Is that after Manila?

A Yes.

Q Ot after the Philippines?

A Yes.

Q Is there a covering letter attached to that survey report?

A Yes, the covering letter is dated August 15, 1968, from Taipai.

Q It is addressed to States Marine?

A States Marine Isthmian Agency, which is the agency for States Marine.

Q Who was the Taiwan Maritime Company?

A That is our agent in Taiwan.

MR. REID: I offer this in evidence.

MR. LARSEN: No objection.

MR. BRADY: I would have the same objection, your Honor.

THE COURT: Overruled.

MR. BRADY: Respectfully except.

xx (Defendant Chios Exhibit E received in evidence.)

Q I will show you, sir, a paper which has already been marked in evidence as Plaintiff's Exhibit 3 this date. Could you identify those papers?

A This is a similar survey report held in the port of Hong Kong.

Q What is the date of that report?

A July 27, 1968.

Q Is there a covering letter with that?

A Yes, dated August 9, 1968.

Q Who is that from?

A Hong Kong Maritime Company, Limited.

Q Who is it addressed to?

A States Marine Isthmian Agency.

Q Who is Hong Kong Maritime?

A That is our agent in Hong Kong.

MR. REID: I would like to offer this as an exhibit.

THE COURT: Any objection?

MR. KLONSKY: It is already marked as an exhibit.

MR. REID: Yes, but he objected to it.

THE COURT: We are admitting it into evidence now. It will be marked Defendant Chios Exhibit F.

MR. KLONSKY: I thought it was already in evidence, your Honor.

I was reading a part of the deposition.

THE COURT: It is already in evidence.

MR. LARSEN: Not as to Castle & Cook up until now.

MR. BRADY: I have the same objection.

THE COURT: Overruled.

(Defendant Chios Exhibit F received in evidence.)

Q Is Hong Kong after the Philippines?

A Yes, it is.

Q I will show you another paper and I will ask you whether or not you can identify that.

A This is a similar survey report held at the port of Kobe, Japan.

Q Who performed that survey?

A International Inspection and Testing Corporation.

MR. KLONSKY: Can we have the date on that, please?

THE WITNESS: August 5, 1968.

Q Who are those people?

A They are surveyors in Kobe that we use from time to time.

Q You received that in the New York office?

A Yes.

MR. REID: I would offer that in evidence.

(Defendant Chios Exhibit G received in evidence.)

MR. BRADY: Will your Honor kindly note the same objection. I know your Honor has overruled it.

Q Do you remember in an examination before trial I asked you for the production of certain photographs which were taken and sent to New York and you said you would

look for them and send them to me when you found them?

A Yes, I did.

Q I will ask you whether or not you can identify these photographs?

A Yes, these are the photographs I sent you and that were referred to in the survey report.

Q Which is already in evidence?

A Yes.

MR. REID: If the Court pleases, I would like to introduce those in evidence together with a blown up copy for the convenience of the Court and the jury.

MR. KLONSKY: Can we see these?

MR. KENNY: May we see these?

MR. REID: Sure.

THE COURT: Is there any objection to the admission of these photographs?

MR. BRADY: If I may ask the witness a question, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. BRADY:

Q Mr. Lantelme, were you ever on the Chios at all?

A No, I wasn't.

Q Were you present when these photographs were taken,

sir?

A No, I wasn't.

Q Other than being in some file, you don't know anything about them, do you?

A No.

THE COURT: Do you have an objection to the admissibility of these photographs?

MR. BRADY: Yes, your Honor.

THE COURT: What is it?

MR. BRADY: The witness can't say this was taken in the hold of the Chios or any other ship.

THE COURT: What do you say, Mr. Reid?

MR. REID: These are referred to, your Honor.

THE COURT: In the report.

MR. REID: Survey report and Mr. Lantelme didn't have these with him when I examined him before trial. I had a letter that indicated they had received them and he said he would look for them. He gave them to Mr. Larsen, his counsel, and his counsel sent them to me.

Now, I have gone through them and it shows some stowage other than in number 3 and I have picked out just number 3, the lower hold so all I am really talking about is one photograph now.

THE COURT: That was a part of a particular report

that is already in evidence?

MR. REID: Yes, it is.

THE COURT: Which one?

MR. REID: The one we marked Exhibit D.

THE COURT: All right, let it be received. Mark it Chios Exhibit D-1.

(Defendant Chios Exhibit D-1 received in evidence.)

xx

Q I will show you another paper and ask you whether or not you can identify that.

A This is a survey report held in Erie Basin Terminal in Brooklyn on discharge of the vessel.

Q Is this the original of that? If it is, we will use the original instead of the copy?

A Yes, it is.

Q Was that report also made and kept in the regular and usual course of business?

A Yes, it was.

Q That is directed to whom and from whom and what is the date of it?

A The report is dated September 30, 1968. There is no covering letter on it.

Q It is addressed to whom?

A It was held at the request of States Marine

Isthmian Agency.

MR. REID: I would like to offer this in evidence.

MR. KLONSKY: May I see that, please. You say September 30th, that is after the accident, right?

THE WITNESS: That is the date of the report.

MR. KLONSKY: What is the date of the survey?

THE WITNESS: August 25th, 26th, 27th, 28th, 29th and 30th.

MR. KLONSKY: Up to the day before the accident.

MR. LARSEN: 1968, Mr. Lantelme.

THE WITNESS: 1968.

THE COURT: Any objection?

MR. KLONSKY: No.

MR. BRADY: I have the same objection.

THE COURT: Overruled.

(Defendant Chios Exhibit H received in evidence.)

Q I will show you this paper, sir, and I will ask you whether or not you can identify that paper.

A This is the mate's receipt for the port of Dadiangas, the port of loading.

Q What is the date of that?

A July 6, 1968.

Q I will show you another paper and ask you whether or not you can identify this.

A This is also a mate's receipt at the port of Dadiangas for July 6, 1968.

Q Were those mate's receipts received by the States Marine in the regular and usual course of business under the charter party arrangement?

A Yes.

MR. READ: I offer these in evidence.

THE COURT: As one exhibit?

MR. REID: One exhibit.

xx (Defendant Chios Exhibit I received in evidence.)

MR.BRADY: May I have the customary objection, your Honor.

THE COURT: Overruled.

Q I will show you these two papers and ask you whether or not you can identify those.

A These are two bills of lading covering pines from Dadiangas to Newark, New Jersey.

Q Whose name appears on the bills of lading?

A States Marine Lines.

MR. KLONSKY: May we have dates?

Q These are the bills of lading that were issued for the ship in question?

A Yes.

MR. REID: I offer those in evidence?

MR. KLONSKY: What are their dates?

MR. REID: Both dated July 6, 1968.

THE COURT: Any objection other than the one. Do you have an objection to these documents?

MR. BRADY: May I just look at those, your Honor?

THE COURT: Yes.

MR. REID: I would like to mention that these papers were submitted to me by Castle & Cook in answer to interrogatories.

MR. BRADY: I have no objection to the bill of lading, your Honor.

THE COURT: All right, they will be received.

(Defendant Chios Exhibit J received in evidence.)

MR. REID: If the Court pleases, we had a cargo plan I guess but I can't seem to put my fingers on it at this moment.

MR. KLONSKY: Plaintiff's Exhibit 3 in evidence is a cargo manifest.

MR. REID: No, that is the cargo stowage plan.

MR. KLONSKY: That is 2 in evidence.

MR. REID: Any objection to it going in evidence? I will find it, your Honor, and we can mark it as a later time.

THE COURT: All right.

MR. KENNY: Is that Exhibit K?

MR. KLONSKY: How can you put something in evidence you don't see.

THE COURT: We will reserve the letter K for that purpose.

Q Under the charter party when the ship arrived at Newark, did States Marine engage Maher Stevedoring Company to stevedore the vessel?

A Yes.

Q And it paid for them?

A Yes.

Q At the loading port where this pineapple was put aboard, under the charter party the States Marine hired the stevedore and paid the stevedore?

A They paid for them. I don't know how they were hired.

MR. REID: If the Court pleases, I will have to ask this witness questions that were asked or read by Mr. Klonsky from this witness' deposition because the attorney for Castle was not present at the time.

THE COURT: All right.

MR. REID: There may be a duplication.

MR. KLONSKY: Could we ask if Mr. Brady would consent

that if he were asked these questions now, the same questions and the same answers would be forthcoming.

MR. BRADY: I'm sorry, I don't know whether they would be forthcoming, sir.

THE COURT: All right, I will explain to the jury that previously plaintiff's counsel read to you a deposition taken before trial, that is testimony taken under oath before trial of this same witness and he read those to you and I explained that that was permissible if the witness were abse .

It now appears that the witness was not absent, but is here to testify as against the defendant Dole group, as we have been calling that particular party.

Now, the plaintiff was able to read that as the testimony or admissions of an opposite party and he read them under that theory to you even though the witness is here. That is a plaintiff or party to the action can read the testimony or use it before trial of any other party for any purpose.

At this time Mr. Read is going to examine the witness on those same questions as against the defendant Dole since they were not present during the earlier deposition.

All right.

Q I will show you, Mr. Lantelme, Plaintiff's Exhibit 2

in evidence and I ask you what this is.

A This is the stowage plan covering all the cargo laded at the various ports.

MR. KLONSKY: Is it dated?

THE WITNESS: It is dated Kobe, July 26, 1967, which seems to be in error. It should be 1968.

MR. KLONSKY: Can we all stipulate that should read 1968?

MR. BRADY: I can't stipulate that it should read 1968.

MR. KLONSKY: Voyage number 5.

Q Does that bear the name of States Marine Lines?

THE COURT: Just a minute. You are proceeding to meet the objection?

MR. REID: Yes, your Honor.

Q Does that bear the name of States Marine Line?

A Yes.

Q For what voyage is that cargo stowage plan?

A The Chios voyage number 5.

Q That is the charter party voyage?

A Yes.

Q What ports did she call in and load?

A She loaded at Claveria, Dadiangas, Manila, Hong Kong, Pusan and Kobe. Those are the loading ports.

Q What was the practice in making up a composite cargo stowage plan, if any, after the last port before sailing for the United States?

A I missed the first part of that question.

MR. REID: Would you read that.

(Read)

A Each loading port would make up their own stowage plan and in the last loading port would make a composite one including all the cargo.

Q Was that cargo stowage plan made in the regular and usual course of business of States Marine?

A Yes, it was.

Q Did you receive it in the regular and usual course of States Marine business?

A Yes.

Q Will you refer to number 3 lower hold, Mr. Lantelme, and tell us whether or not there are any pallets of pineapple?

A Yes, there are 370 pallets of pines from Dadiangas to Newark. 24 pallets of key units. They are also pines.

Q On that cargo stowage plan, what ports was the cargo destined for in the United States?

A Newark.

Q Up at the top?

A All the ports?

Q Yes.

A New York, Newark, Philadelphia, Baltimore.

Q Was that on voyage number 5?

MR. REID: I offer this in evidence.

MR. KLONSKY: I still would like to get that date corrected.

THE COURT: Just a moment. Would you please note that this is Plaintiff's Exhibit 2 already in evidence.

Now, this document was put into evidence, Mr. Klonsky, as I understand it by the plaintiff?

MR. KLONSKY: That's right, ma'am.

THE COURT: You are now asking that the date be clarified?

MR. KLONSKY: Yes, the 1967 date there does not cover voyage number 5. I'm sorry, it is the 1967 date there which does not cover voyage number 5. It has to be a 1968 date.

THE COURT: There is an objection on the part of Mr. Brady to the admissibility of the document since it does not have the 1968 date. Now, the document is admissible and the objection as to the date goes to the weight, which the jury ought to attribute to this document. It is for the jury to decide based on the testimony which

it has heard whether this is a document relating to this particular voyage. The document is admitted over the objection of Mr. Brady.

Would you mark it. You want it in evidence.

MR. REID: We can leave that, your Honor, and just note that it is in evidence with the same number in evidence on behalf of Chios.

THE COURT: Mr. Reid, I think that for the purposes of keeping the record straight it probably ought to have a separate number with respect to your case over against the Dole group defendants.

MR. REID: Thank you.

THE COURT: We will mark that also with this designation, Defendant Chios Exhibit L in evidence.

(Defendant Chios Exhibit L received in evidence)

THE COURT: What did you call that again?

MR. REID: This is called a cargo stowage plan.

Q Was there any practice back in 1968 of States Marine in forwarding a cargo stowage plan when received to the stevedore who was to discharge the cargo at a U.S. port?

A I believe it was.

Q Insofar as you know, that practice applied in this case?

A Yes, sir.

Q Do you have the stevedoring contract with Maher Stevedoring Company?

A No, I don't.

MR. REID: Do you have it, Mr. Kenny?

MR. KENNY: No, I don't.

MR. REID: Will you stipulate that Maher Stevedored the vessel?

MR. KENNY: We will stipulate that. I don't know whether it was pursuant to a written contract.

MR. REID: And States Marine paid for the stevedoring?

MR. KENNY: I can't say that, I don't know, sir.

Q As far as you know, Mr. Lantelme, the States Marine paid for the stevedores?

A As far as I know, yes.

Q In connection with the cargo stowage plan, which we have marked here as the Defendant Exhibit B in evidence, it shows that in number 3 lower hold of the Chios there were 370 pallets of Pines. That means pineapples?

A Yes, it does.

Q Did States Marine have anything to do with placing the pineapples on the pallets?

A None whatsoever.

Q And they came that way into the loading port on the pallets?

A Yes.

Q Had States Marine on prior occasions carried prepalletized pineapples?

A Yes.

Q When did States Marine first start to do that bearing in mind when you started to work for that company?

A Carrying prepalletized pineapples?

Q Yes.

A I guess about 20 years ago.

Q Have you been with the company for 20 years?

A Yes, I have.

Q Are you familiar with the pallets that were used for the pineapples?

A Somewhat.

Q Do you remember what they were made of?

A The pallet itself is made of wood. I don't know how it is puttogether.

Q Philippine mahogany?

A I think it is.

Q And the cartons were glued one to the other?

MR. BRADY: Your Honor, I think he is asking leading questions of his own witness at this stage.

THE COURT: Let's try not to be leading.

MR. REID: He is an adverse party, your Honor.

MR. BRADY: It is your witness.

MR. REID: Very well.

THE COURT: Yes, he is an adverse party as to you.

MR. BRADY: He has been called by this party as a witness, your Honor.

THE COURT: Yes, but he is an adverse party called by this party and therefore he may ask him leading questions. Proceed.

MR. REID: Would you please be good enough to read the last question?

(Read)

A Yes, they are.

Q How many of these cartons would be placed on a pallet?

A It would depend on the size of the can in the cartons.

Q That could be anywhere from 72 to 126?

A I believe that's right.

Q The cans for a carton, that would also depend upon the size of the can, would it not?

A Yes, it would.

Q And there could be 6, 12, 24 and 48 cans to the carton?

A Yes.

Q Do these palletized units or package, did they have straps of any sort around them?

A No, they don't.

Q Take a carton off of a pallet, how would you do that, by taking it off by hand?

MR. BRADY: Objection unless this witness has actually done this, your Honor. I don't see the basis for this testimony.

MR. REID: His experience as a claims and cargo man for 20-odd years.

THE COURT: Do you handle this cargo or supervise its handling?

THE WITNESS: No, I don't.

Q How long has States Marine been carrying these prepalletized cartons into Port Newark?

A About 20 years.

Q How long has Maher been engaged by States Marine to discharge these types of cargo?

A I believe all of that time.

MR. KENNY: Prior to '68.

MR. REID: Yes.

A I believe all of that time, but I am not sure.

Q That would be about 20 years?

A Yes.

MR. KLONSKY: 20 years from when?

THE COURT: I didn't hear that.

MR. KLONSKY: 20 years from when, your Honor?

THE COURT: When did you start working for the company?

THE WITNESS: Well, I am with them 30 years, States Marine Lines, but I think they started prepalletized loads of pineapples about 20 years ago, 20 years from 1968 when this happened.

MR. KLONSKY: Since 1948.

THE WITNESS: I would guess, yes, I don't know exactly.

THE COURT: I am getting confused now. 20 years from when?

THE WITNESS: 1968 when this happened. This voyage was 1968. So they started prepalletized pineapples about 1948. I may be wrong a few years one way or the other. I believe it is about that long.

Q Over this period of 20 years that you referred to, could you tell us whether or not you know that the same type of pallets and the same type of construction and

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loading was used by the ship owner? cross

A I have no idea.

MR. REID: No further questions.

MR. KENNY: Your Honor, I have a few and I will be brief.

CROSS EXAMINATION

BY MR. KENNY:

Q Mr. Lantelme, I ask you to look at the bill of lading marked in evidence. I will put them up here, Exhibit K. Exhibit J, the two bills of lading.

A Yes.

Q Are those bills of lading clean?

A Yes, unless there are exceptions on the rider, which is not here.

Q Tell me what a clean bill of lading is.

A A clean bill of lading is a bill of lading that has no exceptions to the condition of the cargo such as damage or short.

Q This bill of lading that is in evidence refers to the cargo that was loaded at Dadiangas?

A Yes.

Q That is the cargo of palletized pineapple that was stowed in the number 3 lower hold of the Chios, is that correct?

A Part of it was at least.

Q Had any of the pallets had an obvious defect, been damaged, would that damage have been noted on that bill lading?

MR. BRADY: Objection, your Honor. The rider is missing. The witness has said part of it is missing.

THE COURT: Yes, the witness has so testified.

THE WITNESS: Can I say something, your Honor?

THE COURT: There is no question pending before you.

MR. KENNY: I believe there is a question, your Honor.

THE COURT: The objection was sustained in that the witness has testified that he cannot answer that in that the rider may have contained such a defect.

Q If the rider contained such a defect, would it have been noted on the face of the bill of lading?

MR. BRADY: Objection to what a rider might have contained, your Honor.

THE COURT: No, he can ask him whether a rider containing a defect would have been noted on the face of the bill of lading.

MR. BRADY: Objection, your Honor. It may not have been noted even though a defect existed.

THE COURT: We will ask him if that is the practice.

Q That is what I am asking. In the usual course of the business of States Marine if on arrival to a bill of lading there had been noted damage to a pallet, would that damage have been noted on the face of the bill of lading?

MR. BRADY: Objection, your Honor.

THE COURT: You are being asked about the usual course of business. You have been there 20 years.

THE WITNESS: Yes.

THE COURT: Have you seen bills of lading over 20 years?

THE WITNESS: Yes.

THE COURT: Tell us about your experience in that regard.

THE WITNESS: If there was an exception on the rider--

MR. BRADY: Excuse me. He hasn't answered the question, your Honor.

THE WITNESS: If there is an exception on the rider, it is usually placed on the face of the bill of lading.

Q Is there any exception listed on the face of the bill of lading in evidence?

A No, there isn't.

Q So there were no obvious defects in the pallets when they were loaded to the Chios at Dadiangas in July of 1968, is that correct?

MR. BRADY: That calls for a conclusion, your Honor. I object.

THE COURT: The objection to that is sustained. You can only ask him about the face of this document.

Q Is there any notation on the face of the document which indicates that any of the pallets of pineapple were obviously damaged?

MR. BRADY: Excuse me, your Honor, the document speaks for itself.

THE COURT: Yes.

Q I ask you to look at Exhibit I, the mate's receipt, and I ask you whether on those mate's receipts in evidence as Exhibit I there are any notations with regard to any of the pallets of pineapples that were loaded to the Chios at Dadiangas in July of 1968?

MR. BRADY: Your Honor, that exhibit speaks for itself.

THE COURT: Again he can look at it and tell us if there are any such notations.

A There are notations or exceptions on the mate's

receipt. Is that issued as the goods are coming from the pier and over the side of the vessel?

A It is issued on completion of loading.

Q In your experience in 30-odd years with States Marine had any of those pallets obviously been damaged, would the condition of that pallet have been noted on that mte's receipt?

MR. BRADY: That calls for a conclusion again, your Honor, we are talking about a specific document and he is saying a hypothetical for something that this witness has no knowledge whatever about.

THE COURT: Again he can tell us whether in the usual course of business a mate's receipt would contain any such designation. That doesn't say it was in this case, but he can ask him about the normal procedure.

A If there is an obvious damage it should be on the mate's receipt.

Q That document doesn't have any?

A No.

Q In your service with States Marine with regard to cargo and containers that carry cargo and pallets, do you know about the term latent defect?

A Yes.

Q What is a latent defect, sir?

MR. BRADY: Objection, your Honor. He is not qualified to discuss latent or any other kind of defects. He is merely a man who handles papers.

THE COURT: Overruled.

MR. BRADY: Respectfully except.

A A latent defect is a condition to a pallet or case or piece of machinery that lends itself easily to damage or is previously damaged and can't be seen.

Q Can't be seen, it is a hidden defect, is that right?

A Yes.

Q These bills of lading and the mato's receipts, which are in evidence, they could have been issued clean even though there was a latent defect in the pallets upon which these cartons of pineapples were shipped, is that correct, sir?

MR. BRADY: Objection. It is speculative and also calls for a conclusion about things this witness cannot answer.

THE COURT: Overruled.

MR. BRADY: Respectfully except.

A Do you want to read that question again?

THE COURT: Read the question, Mr. Reporter.

(Read)

A Yes.

MR. KENNY: Thank you, Mr. Lantelme.

THE COURT: Any further cross-examination of this witness?

MR. KLONSKY: I would like to ask him one question.

CROSS-EXAMINATION

BY MR. KLONSKY:

Q Were there any claims made of any pineapples when it came to the port of Newark?

A Yes.

Q By whom?

A Dole.

Q Do you know how many damaged cartons there were?

A Not offhand.

Q What was the claim filed for the damage to Dole pineapples?

A I don't have any records.

Q Do you recall in your examination before trial you said the claim was filed January 6, 1969?

A It could have been.

Q Does that pertain to voyage number 5?

A Yes.

Q Does it pertain to cartons of pineapple in number 3 lower hold in part?

A It could be. It could be from the other hatches.

Q You don't have any records on this?

MR. KLONSKY: I have nothing further.

THE COURT: Do you have any cross-examination, Mr. Brady?

MR. BRADY: Yes.

CROSS-EXAMINATION

BY MR. BRADY:

Q You have been employed by States Marine for how many years, sir?

A I am in my 30th year, sir.

Q What do you do for them?

A I am a cargo claims manager.

Q Other than being in the claims department, have you been in any other department for States Marine?

A No.

Q You have always been a claims man?

A Yes, sir.

Q You never handled loading?

A No, sir.

Q You never handled unloading?

A No, sir.

Q Did you ever go to any of these ports of call?

A Yes.

Q When did you last go, sir?

A I would guess maybe six years ago, seven years ago.

Q But your normal procedure is to stay inside an office, is that correct, sir?

A Yes.

Q You weren't present on the day this particular voyage of the Chios was unloaded, were you, in Newark?

A No, sir.

Q How far away were you that day?

A 90 Broad Street.

Q In Manhattan?

A Yes.

Q Was there a practice in 1968 for States Marine to ship prepalletized packages of Dole goods, isn't that right, sir?

A Yes.

Q You have told the jury and this court that in fact States Marine did it for about 20 years before 1968, isn't that right?

A Well, yes. States Marine Isthmia. There are two companies together. Isthmian did most of the shipping. That is where the 20 years come in.

Q In any event, this was a very common practice of packaging cans of pineapples, wasn't it?

A Yes.

Q It was done certainly through the company for whom you worked for approximately 20 years?

A Yes.

Q In other words, the packages were prepalletized and they were spot glued, that was a common practice, too, wasn't it?

A Yes.

THE COURT: Don't ask two questions at the same time, please.

MR. BRADY: Excuse me, your Honor.

THE COURT: Which one do you want him to answer?

Q The prepalletizing concept, that was in effect for a long period of time prior to 1968, is that correct?

A Yes.

Q Your company was aware of the manner of the shipment, isn't that right?

A Yes.

Q And your company was also aware of the type of package which was involved, is that right?

A Yes.

Q In other words, your company knew all those years that there was a pallet involved and that packages of pineapples of various weights would be placed on top of a

pallet and spot glued, is that correct?

A Yes.

Q That was a standard practice as far as your company was concerned, wasn't it, sir?

A Yes.

Q You never saw a single one of those pallets at all in all your 20 years of work, isn't that right?

A Sure I did.

Q Did you ever see a pine pallet at all, sir?

A You mean the wood, pine wood?

Q No, the pine pallet. By the pine pallet.

A The pallet with the pineapples on?

Q Yes.

A Yes.

Q Did you ever tell anybody you never saw a pine pallet?

A Did I ever tell anyone I never saw one?

Q Yes.

A I don't think so.

Q Do you recall your examination before trial, sir?

A Yes.

Q Do you recall that you were under oath?

A Yes.

Q Do you recall that, sir?

A Yes.

Q That was taken March 28, 1974, is that correct?

A I think that is the date. I am not sure.

Q About a year ago?

A Yes.

Q Do you recall being asked questions and giving answers?

A Yes.

MR. BRADY: Page 25.

Q Your attorney was present, is that correct, sir?

A Yes.

Q You had a lawyer present?

A Yes.

Q Do you recall being asked these questions and giving these answers, sir:

Question page 25, line 2.

"Q Are you familiar with what you know to be a regular stevedore's pallet?

"A I have seen them, yes."

Do you recall that question and answer?

A Yes.

Q Do you recall this question and answer, line 5:

"Q And have you ever seen a pallet which brings in the pineapple?

"A The pineapple, no, I haven't."

Do you remember that, sir?

A Yes, I was referring to the pallet itself, just the wooden part, not the complete loaded pallet.

Q You have never seen the Dole pineapple pallet at all?

A Not the wooden pallet itself.

Q You have never seen that?

A No.

Q In fact, the next question on line 8, page 25.

"Q You have never seen those?

"A No."

Do you recall that question and answer, sir?

A If it is there, I guess, yes.

Q I didn't put it there.

A Yes, if you say so, yes.

Q Didn't you have this transcript sent back to you for signature?

A Yes.

Q Let me ask you, sir, if this is your signature on the last page of that transcript?

A Yes.

Q So you had an opportunity not only to testify under oath last year, but the booklet was sent to you for

review?

A Right.

Q And you read it?

A Right.

Q And you approved of it?

A Right.

Q And you had it signed under oath again?

A Right.

Q The second time you said you had never seen a pine pallet, isn't that right?

A A pine pallet.

Q A Dole, the pallets upon which the Dole pineapples go. That is what we are talking about in this case.

A I have to differentiate between the wood and the pallet itself and the completed pallet with the wood pallet and the cartons of pineapples on it. I call that a pine pallet. The pallet itself I didn't see it separated from the cartons.

Q In all your 30 years with States Marine you have never seen a bare bones pallet, is that what you are telling the jury now?

A A what?

Q I mean a bare bones pallet, I mean a stripped pallet.

A Not a pine pallet. Stevedore's pallets.

Q Now, as a matter of fact, sir, there were some damaged goods, weren't there? Weren't there some pine-apples damaged on this voyage?

A Yes.

Q As a matter of fact, didn't States Marine reimburse Dole for those damaged goods?

A Yes.

MR. BRADY: No further questions.

THE COURT: Anything further of this witness?

MR. REID: No.

THE COURT: If not, thank you, you may come down. You are excused.

(Witness excused)

THE COURT: We are going to recess now until 9:30 tomorrow morning. Please report here at 9:25.

The jury is excused.

(Jury left the courtroom.)

THE COURT: Mr. Klonsky, tomorrow morning the plaintiff will resume the stand, is that right?

MR. KLONSKY: Yes, Mr. Amarante will be here too to interpret.

THE COURT: How many more witnesses do you have?

MR. KLONSKY: I may have a doctor. I will not have any more fact witnesses. I have two depositions to read

E D W A R D T. P O N E K, called as a witness by defendant and fourth-party plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. REID:

Q Mr. Ponek, by whom are you employed?

A Maher Terminals, Inc.

Q Were you employed by Maher Terminals, Inc. in September, September 1, 1968?

A Yes,sir.

THE COURT: Excuse me, Mr. Reid. Before you proceed, I am going to ask the clerk to draw that blind. The sunlight is blocking my view.

Thank you.

Q In what capacity were you employed in September, 1968?

A As manager of safety, sir.

Q What were your duties at that time as a safety manager for the company?

A Basically to provide and maintain a safety program for the entire Maher organization and see to it that it is implemented and carried out.

Q Would your duties carry you aboard ship?

A Yes, sir.

Q And what connection would your duties have with being aboard a vessel?

A To observe operations aboard a vessel, to observe conditions aboard a vessel under which our employees could be working, either myself or our safety representatives would perform this function.

THE COURT: Please don't let your voice drop. Keep your voice up so the jurors can hear you.

THE WITNESS: Yes, your Honor.

Q What, if anything, did you have to do with the investigation and the reporting of accidents which occurred aboard ship?

A When an accident occurred a safety representative would be called as the individual was being -- as the accident was being reported and the safety representative would take the information concerning the accident and so on and provide first aid if that were necessary, see to it that the individual was properly taken care of, find out how the accident occurred.

Q Were you notified of an accident which occurred on September 1, 1968 at around 12:35 p.m. to the plaintiff in this case, Mr. Jose Fernandez?

A I personally have no knowledge of being

notified, sir, only according to my records.

Q Did you make an investigation?

A I personally?

Q Yes.

A Not to my knowledge.

Q Did anyone on your staff who is responsible to you make an investigation?

A I can only say that according to the record one of my people obtained the information concerning the accident as to what occurred.

Q Is that a part of your duty and your subordinate's duty to make an investigation and obtain information?

A Yes, sir.

Q Was that done at the time the accident occurred or shortly after?

A Yes, sir.

Q Was an accident report made?

A Yes, sir.

Q Was it the regular and usual course of the business of Maher Stevedoring Company to make an accident report?

A Yes, sir.

Q Is it the usual and customary experience and

the course of business of Maher to maintain that record in the usual course of business?

A Yes.

Q Do you have an accident report with you in your file?

A Yes, sir, I do.

Q Where did you obtain that accident report, from what file?

A From the accident file which I maintained in regard to this particular accident.

Q That is a business file of the company?

A Yes, sir.

Q May I see that, please?

A This is the initial accident report, sir.

Q Does that bear your signature?

A Yes, it does.

Q Whose handwriting is that?

A That is my handwriting.

Q Did you fill this out in the course of your duties as the safety man?

A Yes, sir.

Q And signed it as such?

A Yes, sir.

Q You have produced this from the company

files?

A Yes, sir.

Q It has been maintained in the company files since the day of the accident?

A Yes, sir.

MR. REID: I would like to offer this in evidence.

MR. KLONSKY: May I ask a question or two of this witness.

THE COURT: Let's have it marked first as an exhibit.

(Defendant Chios Exhibit H was marked for identification.)

THE COURT: Do you have the cargo manifest which we were to mark as Exhibit K?

MR. REID: Yes, your Honor.

MR. KLONSKY: May I have some voir dire on this?

THE COURT: Just a moment, please, until we get this marked.

MR. BRADY: A witness just walked in, your Honor.

THE COURT: Would you show him to the witness room.

Whose witness is that?

MR. BRADY: I believe he is Mr. Reid's.

MR. REID: I would like to excuse this witness, your Honor.

MR. KLONSKY: Can you tell us his name?

MR. REID: Peterson.

THE COURT: Now, Mr. Reid, do you have that cargo manifest which we referred to yesterday?

MR. REID: Yes.

(Defendant Chios Exhibit K was received in evidence.)

THE COURT: I gather we received that wihout objection. Was there an objection to the cargo manifest yesterday?

MR. LARSEN: There was no objection.

THE COURT: You may ask your questions.

VOUR DIRE EXAMINATION

BY MR. KLONSKY:

Q Mr. Ponek, this bears your signature?

A Yes, sir.

Q It has your handwriting?

A Yes, sir.

Q Did you take this information from the plaintiff?

A I don't know, sir. It may have been obtained by one of my people.

Q The point is I want to know whether you got it from the plaintiff or from a third source. I thought your testimony was to the effect that you said someone else took the information.

A The document bears my signature. I can't recall now whether I assume I took the information concerning the fact that the entire document is in my hand waiting, but I can't recall having talked to the plaintiff on the day of the accident.

Q Do you speak Spanish?

A No, sir.

Q Did you have a Spanish interpreter at the time this was taken?

A I don't know, sir.

MR. KLONSKY: I object to this, your Honor.

THE COURT: What do you say, Mr. Reid?

MR. REID: It is a business entry of the company.

MR. KLONSKY: Without knowing who made it.

MR. REID: That is the whole purpose of -

the business entry statute. You don't have to call every witness who participated in the preparation of a document.

THE COURT: The document is admissible. The objection goes to its weight and not its admissibility. Let it be received.

(Defendant Chios Exhibit H was received in evidence.)

DIRECT EXAMINATION CONTINUED

BY MR. REID:

Q I see on this report, Mr. Ponek, under the heading of "Nature of the Injury," it has "Laceration of the scalp."

A Yes, sir.

Q Did you or your subordinate obtain any history of unconsciousness of this plaintiff?

MR. KLONSKY: Objection, your Honor. Whether he or his subordinate. We don't have the name of the subordinate.

THE COURT: Yes.

Q Or did you, Mr. Ponek, obtain any history of any unconsciousness?

A No, sir.

MR. KLONSKY: We don't know whether he

saw this man or took the information. How can he testify about what the plaintiff might have told him? And he also said he had no interpreter present.

THE COURT: Just a minute.

You are asking this witness whether that report you have in your hand reflects unconsciousness or whether he has any additional report?

MR. REID: I am asking him does this report reflect any unconsciousness.

MR. KLONSKY: I object to that, your Honor, on several grounds. Those that I expressed and also the fact that this witness, this paper speaks for itself. It is in evidence.

THE COURT: Yes, it does.

MR. REID: Mayby I will ask him these questions.

Q As a part of your duty of a safety expert with the company, was it the custom and practice of the company to try to ascertain on the spot as well as you could the nature and extent of a person's injuries?

A Yes, sir.

Q The accident report should reflect what was ascertained and learned from the investigation.

MR. KLONSKY: Your Honor, I object to

this. It speaks for itself.

THE COURT: Yes, I think that is true. This witness has testified he made no personal investigation. All he is able to do is to testify that that is a business record made and kept in the regular course of business and it was the regular course of business to make and keep such a record.

BY MR. REID:

Q Mr. Ponek, have you any knowledge, on or about September 1, 1968 and prior thereto, as to the type of pallet on which the cartons of pineapple were stored and brought into the Port of Newark?

A As to the type of pallet for this type of cargo, sir?

Q Yes.

A Yes.

Q Is some of the cargo delivered off the pallet to consignees?

A Not to my knowledge, sir.

Q On occasion are these pallets -- were these pallets left in the Maher warehouse?

A You are referring to well after a ship is finished discharging?

Q Yes.

A Yes.

Q What is done with those pallets?

A I don't know how they are disposed of, but the pallets are disposed of.

Q Would you say that they were disposable pallets?

MR. BRADY: Objection, your Honor. There is no basis for that testimony in this case.

THE COURT: Are you telling us something you know of your own knowledge? Have you observed the unloading of such cartons of pineapple?

THE WITNESS: Yes, your Honor, I have seen it.

THE COURT: Unloaded.

THE WITNESS: From a vessel and also being delivered to a truck later back at the warehouse area.

THE COURT: What stage are the pallets disengaged from the package itself?

THE WITNESS: The vessel is discharged and then the cargo is moved from a transit area, which is a pier area, back to a warehouse area where the cargo is in storage under a warehouse receipt and remains there for some length of time in a warehouse state and then it is delivered to consignees and at that point it becomes

disengaged from the pallet and is loaded on trucks or however they are going to take it away.

THE COURT: You have seen this?

THE WITNESS: Yes, your Honor.

BY MR. REID:

Q There is an order for these cartons which are on the pallet, if it is not an order for the entire contents of the pallet. Are these individual cartons moved off onto trucks and delivered?

A Yes, units are broken up to make up orders and then units are loaded on trucks or cartons are loaded.

Q How are those removed, these cartons removed from the pallet, one from the other?

A Well, a certain number of cartons are picked up either by hand or by what is called a squeeze box on a Hi-Lo. They are lifted up in units.

Q For instance, if you wanted to take one off of the top, if you just needed one more to fill an order, you could take it and break the glue?

A You would have to rip it. It takes a bit of force because the cartons are glued in a unit.

Q But that doesn't damage the cardboard?

A No, sir.

MR. REID: I have no further questions.

MR. KENNY: I have no questions, your Honor.

THE COURT: Just a moment, Mr. Larsen.

MR. LARSEN: Mr. Klonsky may proceed.

CROSS EXAMINATION

BY MR. KLONSKY:

Q Mr. Ponek, you have seen these prepalletized cargoes before, have you not?

A Yes, sir.

Q Was there any band or any lashing or any safety device around the cartons to keep them integral and whole?

A On a unit, sir?

Q Yes.

A No.

Q Your observation is that these were disposable pallets?

A Yes,sir.

Q As contrasted with a regular stevedores' pallet, is that true?

A Yes, sir.

Q The wood in these disposable pallets, were they of the same consistency and the thicknesses as in a regular pallet?

MR. BRADY: There is no basis that he compared wood with any pallet.

THE COURT: Ask him if he has ever seen a regular stevedores' pallet.

Q Have you ever seen a regular pallet on a dock?

A Yes, sir.

Q In a warehouse?

A Yes, sir.

Q Can you compare them as far as the quality of the wood and thickness of the wood is concerned?

A I can visually compare a Maher-purchased pallet as against one of these pallets, yes, sir.

Q Do so.

A Would I?

Q Yes, please compare them.

A The Maher pallet is a heavy oak pallet which generally takes two people to lift. It probably weighs 200 pounds.

The pallet generally used to carry the cargo that we are talking about is a light pallet. It is commonly known on the pier as a disposable pallet. I don't know in fact that it is pine, but it is a very light wood.

Q Is the wood thinner?

A Sir.

Q Is the wood thinner?

THE COURT: Thinner than what?

Q Thinner than the regular pallet.

MR. BRADY: Objection, unless this witness has taken actual measurements and made tests. There is no basis for this testimony.

THE COURT: I thought he just testified.

Have you seen a regular stevedores' pallet such as you have just described?

THE WITNESS: Yes, your Honor.

THE COURT: Where did you see it?

A In the normal course of our business we use them daily.

THE COURT: All right. Proceed.

Q Do you recall you gave testimony with all the attorneys present on the 5th day of August, 1974?

MR. BRADY: Your Honor --

THE COURT: Is there a question to the witness.

MR. KLONSKY: I asked if he gave testimony.

THE COURT: Is there an objection that he was not qualified to testify as to the materials used

in pallets. We have just established that he is because he has observed them regularly in the course of his business.

MR. KLONSKY: I am sorry.

THE COURT: That objection is overruled. Let's proceed with that.

BY MR. KLONSKY:

Q Would you please answer that question, Mr. Ponek?

A I have lost the question.

THE COURT: You were in the course of describing the difference between a stevedores' pallet and a pine pallet and what the difference in the wood was, as I understood it.

A Well, your Honor, yes.

The wood of one of these pallets, as I said, I can't describe the type of wood that it is, but it is lighter than the wood used in a stevedore pallet.

MR. BRADY: Objection, your Honor. If he can't describe the type of wood, he is not qualified to say whether it has relative strength or not.

THE COURT: You mean you are not able to say whether it is oak as opposed to walnut, is that what you are saying?

THE WITNESS: That is correct, your Honor. I can lift, physically lift, one of these pallets, but I can't lift a stevedoring pallet.

BY MR. KLONSKY:

Q Do you recall giving testimony, as I said before, on August 5, 1974 where there were attorneys present and you were asked questions?

A Yes, sir.

MR. KLONSKY: Page 24, line 9.

Q Were these questions asked and were these your answers:

"Q Now, this shipment in the lower No. 3 hold has been described as being pre-palletized cartons of pineapple.

"A Yes, sir.

"Q Now, could you, in your experience, tell us what that is?

"A What a pre-palletized unit of pineapple is?

"Q Yes.

"A It's a number of cases of pineapple placed on a disposable pine pallet, each layer from the pallet up having a slice of -- I call it a slice -- a layer of glue from the pallet, from cartons, and up to the top of the drft, as it would be called, th reby causing

it to become a unit.

"Q These units, are they strapped in any way with a rope or metal bands?

"A No, sir.

"Q You speak of them as a disposable pallet.

"A Yes, sir.

"Q In your experience, what is a disposable pallet?

"A A disposable pine pallet.

"I call it a disposable pine pallet versus a stevedore oak pallet.

"A pine pallet is something that is not as sturdy and durable as an oak pallet used by a stevedore over and over again.

"Q These are one-shot deals, are they?

"A I don't know if they are one-shot deals, but they are not designed for numerous or extensive use, and I have been told that they are disposable.

"Q Could you contrast for us a little bit more in detail the difference between these pine pallets and a pallet like the stevedore uses; like, for instance, Maher?"A For instance, the stevedore pallet -- first of all, the wood is a heavy wood; it's hardwood, and it's usually a 4 by 8 or some other large size surface

pallet.

"The pallets on which these units of pineapple are prepared is designed to cover only the area that the cases of pineapple cover; the cases come to the edge of the pallet, and they are uniform as such. They don't overlap the pallet, and there's not excess space.

"Q In the stevedore's pallet, they set up like there's a bottom layer and a top layer with springers in between?

A In between. These are of the same type design"?

Did you give those answers to those questions?

A Yes, sir.

Q And they are true to the best of your knowledge?

A Yes, sir.

THE COURT: What was that in between? I didn't get the word, something in between.

MR. REID: I think that is a mistake in recording. It says springers, but what they mean is stringers.

MR. KLONSKY: That's right.

THE COURT: Stringers in between.

Q Now, sir, this report of accident, which may or may not have been taken by you, it is dated September 4, 1968, is that true?

A I haven't got it in front of me, sir.

Q Assume it is, because I have the date here. The accident was September 1, 1969. Could you tell me why this lapse of time?

A No, sir.

Q Are you aware that on September 4, 1968 the plaintiff was in a hospital, having fainted in the street?

A No, sir.

MR. KLONSKY: That is all.

CROSS EXAMINATION

BY MR. LARSEN:

Q Mr. Ponek, did you ever see one of these pine pallets, as you described it, discarded, put in a pile for disuse?

A Yes, sir.

Q You did. You saw this before the accident of September 1, 1968?

A I can't state that I have.

Q Would you tell us when you saw this occur?

A I have seen at various times outside of our

warehouse area pallets segregated where there were some that were good and some that had been broken up and they were going to be taken away to a dump.

Q It is your testimony that some of those pallets were the types involved in this suit that is on trial today?

A Yes, sir.

Q You describe it as a pine pallet?

A Yes, sir.

Q There is testimony in this case that in fact that pallet was mahogany. Do you know anything about the qualities of mahogany?

A No, sir.

Q Is it a hardwood, do you know?

A I don't know.

Q Is it harder than pine, do you know?

A Well, from common knowledge I would assume that it is harder than pine.

Q What is the makeup of the pallets that are used regularly by the stevedores such as Maher at its terminal?

A Maher buys an oak pallet.

Q That is a hardwood?

A Yes, sir.

Q You don't know whether mahogany is a hardwood?

A Not to my knowledge,no, sir.

Q You don't know whether mahogany is harder than oak?

A No, sir.

Q You don't know the relative strengths of those two woods?

A No, sir.

Q For how long a period of time had Maher been accepting cargo of this type from vessels at its terminal in Port Newark?

It is Port Newark, isn't it?

A Yes, sir. I have been --

Q Prior to September 1, '68.

A From personal knowledge, I have observed these vessels since 1965 when I came into the employ of Maher.

Q Do you know of any other occasions on which there were any problems with these pallets?

A I don't recall, sir.

Q You don't recall of any?

A No.

Q In the three years, approximately, that you

were with Maher prior to September 1, 1968?

A I don't know --

Q breakage?

A Occasionally a pallet has broken, but I cannot give you a specific date and time that it may have occurred. I have seen broken pallets both on the pier and in the warehouse.

Q Pine pallets?

A Yes; commonly known as a pine pallet, yes, sir.

Q Do you know if any action was taken by your company against the shipper or the carrier with respect to the --

MR. KLONSKY: First it should be ascertained whether he is in charge or responsible for such information.

MR. LARSEN: He testified he had knowledge of broken pallets.

THE COURT: If he knows of his own knowledge.

Q Do you know of your own knowledge of these breakages?

A Yes, sir, I don't know how they have occurred.

Q Was any action taken with respect to the

breaking of these pallets against anybody?

A I don't know, sir.

Q When the Chios came in to Newark for discharge, who from your company would supervise the discharging of the cargo?

A A superintendent.

Q Who was that?

A I don't know, sir.

Q Do you know if he is still in your employ, whoever he is?

A I would seriously doubt it.

Q What was his function -- I withdraw the question.

Do your duties include inspecting the cargo on the ship before it is discharged?

A A marine superintendent generally walks the entire vessel observing what occurs because he is in charge of the discharge.

Q Did you or anyone in your company, to your knowledge, receive any notice that there was any problem with the stow of the cargo that had come into Port Newark on the Chios?

A I have no knowledge or record of that.

MR. LARSEN: I have no further questions.

CROSS EXAMINATION CONTINUED

BY MR. KLONSKY:

Q Mr. Poken, if there was damage to the cargo, would that be something that you personally would be involved with?

A No, sir.

Q And if there is a time charter for States Marine and a shipper called Dole Pineapple Company, and there is a claim made by Dole with respect to what occurred in the transit of the cargo, would that come within the ambit of Maher terminals? Would that be a responsibility of your company?

A Between Maher and Dole?

Q Yes, if you know.

A I don't know.

MR. KLONSKY: Your Honor, I offer in evidence a States Marine form with respect to damage involving the pineapple on this voyage.

THE COURT: Mr. Larsen?

MR. LARSEN: I object as being not material to the circumstances of this case involving the breaking of a pallet. This apparently reports certain damage to cartons of pineapple, but not necessarily, to our knowledge, to the event that we are concerned with in

this case, your Honor. I don't think it is germane.

MR. KLONSKY: It pertains to this case. Can I show it to your Honor?

Do you have the original of this?

MR. LARSEN: No, I don't.

MR.KLONSKY: This is a little difficult to read because it is a photostat.

Do you have a better copy of this, Mr. Reid.

If your Honor will look at this, it is the SS Chios --

THE COURT: Just a moment.

MR. KLONSKY: Here is a much better copy.

THE COURT: It does appear to relate to this voyage.

MR. LARSEN: Judge Motley, may I respectfully submit that there are records in this case that indicate that there were pines stowed elsewhere other than lower No. 3 hold. That document does not indicate the locale of whatever damage is set forth there and therefore it is uncertain as to the site of the damage and therefore not admissible.

THE COURT: This is a claim made by Dole, the shipper, to States Marine, is that it?

MR. LARSEN: That is correct.

THE COURT: For damage to pineapple cartons on board this particular voyage?

MR. LARSEN: That voyage. But it doesn't indicate whereabouts the damage occurred.

THE COURT: Overruled.

MR. LARSEN: Exception, please.

THE COURT: Is there any other objection to the admissibility of this document? All right, let it be received.

(Plaintiff's Exhibit No. 6 was received in evidence.)

MR. KLONSKY: May I read part of it to the jury, your Honor?

THE COURT: Yes.

(Mr. Klonsky read from Plaintiff's Exhibit 6 in evidence to the jury.)

BY MR. KLONSKY:

Q When you talk about pines pallet or pallet of pines, that is not the quality of the wood you are talking about, it is the quality of the cargo itself?

A When you speak of a pallet of pines, you are talking about cargo, yes, sir.

Q That is what you mean here when you have the

word "pine" with relation to this pallet, isn't that true?

A No, sir.

Q Were you talking about the wood being pine wood?

A Common terminology for this pallet on the waterfront or during the discharge of one of these vessels is pine pallet.

Q Which means what, the cargo or the wood?

A The wood, sir, the pallet.

MR. KLONSKY: Really. That is all.

THE COURT: Anything further with respect to this witness?

MR. BRADY: May I have a few questions, if your Honor please?

THE COURT: Yes.

MR. BRADY: Thank you.

CROSS EXAMINATION

BY MR. BRADY:

Q Mr. Ponek, I understand you are the safety manager for Maher?

A Yes, sir.

Q You were a safety man back in 1968, is that correct?

A Yes, sir.

Q Would it be fair to say that you know about the fork lifts and the Hi-Los?

A Yes, sir.

Q Would it be fair to say that you are knowledgeable about the operation of a fork lift and a Hi-Lo?

A As regards --

Q Well, certainly Maher Stevedores uses fork lifts, do they not?

A I am not a Hi-Lo operator, sir.

Q But you are knowledgeable about Hi-Los, aren't you, sir?

A Basically, yes, sir.

MR. KLONSKY: Your Honor, this does not go within the ambit of the direct and cross. I don't think we discussed the Hi-Los at all with this witness.

MR. BRADY: I am an adverse party, your Honor.

THE COURT: Yes, you may proceed.

Q As a safety man, you have to have some knowledge of Hi-Los and fork lifts, isn't that right?

A Yes, sir.

Q You know what kind of a machine that is, don't you?

A Yes, sir.

Q Would you tell this jury, please, what a Hi-Lo or a fork lift is?

A It is a four-wheeled, motorized piece of equipment that raises cargo on forks which elevate upward and downward and moves the cargo from one place to another.

Q Those are those little machines that you see driving in all crazy directions, aren't they?

A There are big ones and there are little ones, sir.

Q Can't they make sharp turns?

A They can.

Q Don't they act on a very small radius?

A They can, sir.

Q You know something about the men who operate these fork lifts, don't you?

A Yes, sir, they are longshoremen.

Q Right.

What about their ability; don't they have to be mentally and physically alert to operate fork lifts?

MR. KLONSKY: This is very general, your Honor. It does not pertain to the individual who

operated the fork lift in this case.

THE COURT: Yes, sustained.

MR. BRADY: If your Honor please, if I may, certainly the qualities of a fork lift operater are very important to this very case. Since the plaintiff himself is now a fork lift operator and since his mental and physical condition has been raised as an issue I submit that it would be a valid probing to find out what a fork lift operator need possess.

THE COURT: For that purpose, yes. it is admissible.

MR. BRADY: Thank you, your Honor.

Q Wouldn't it be fair to say, sir, that a fork lift operator, he must have mental and physical fitness? Isn't that correct, sir?

A Yes, sir.

Q I presume he has to take a test to operate these fork lifts, doesn't he?

A There is no test, to my knowledge, sir.

Q But you are a safety engineer. You don't let men operate these unless they are experienced.

A We hire them as fork lift operators, sir.

Q Can you tell me about their physical and mental condition when they operate these fork lifts?

A No, sir.

Q You can't tell me anything about their mental and physical condition?

A I -- a longshoreman is hired as a driver, and if he operates the machine properly, he is a driver, and I don't know how to answer your question any further than that.

Q Does the driver have to lift cargo?

A By hand, sir?

Q No, by machine, sir.

A That is the purpose of his being on the machine.

Q Does he have to know what the surrounding geography is as the driver of a fork lift?

A Yes, sir.

Q Does he have to be aware of the immediate vicinity around him?

A Yes, sir.

Q Should he be able to look to his right and left quickly?

A He has to be able to look to his right and left, yes, sir.

Q In other words, he has to have a supple neck, doesn't he?

MR. KLONSKY: I object to this, your Honor. He is now going into the medical phase of this.

THE COURT: Yes. This witness is not qualified to testify as to that.

BY MR. BRADY:

Q In your work as a safety engineer, sir, you say you use fork lifts, is that correct, Maher does?

A Yes, sir.

Q And rhey use them in the loading and unloading processes, is that right?

A At times, sir.

Q This ship, Chios, that was unloaded partly by fork lift, wasn't it?

A Yes, sir.

Q The man who operates that fork lift, he should be an experienced man, shouldn't he?

MR. KLONSKY: Your Honor, is this for the purpose of determining whether the plaintiff is operating properly or someone on the Chios? The plaintiff was not an operator of a Hi-Lo on the Chios.

MR. BRADY: I am not asking that now. Your Honor has told me I should not speak about the plaintiff as an operator any longer.

THE COURT: I haven't told you that. I

permitted you to ask questions for the purpose which you said they were being asked. Now where are we going?

MR. BRADY: I am referring to the operator of the fork lift on the Chios, Your Honor, and not the plaintiff.

THE COURT: You are asking this witness whether he was present and whether he knew the man who operated it at the time?

MR. BRADY: No, sir, I am asking this witness, as the safety engineer for Maher, whether or not it would be good practice to use experienced fork lift operators --

THE COURT: He has already testified that they hire them as experienced people. Now where are we going?

MR. BRADY: Let me ask him this question:

Q Of course, if the man were in experienced operating a fork lift inside the hold of that ship Chios, that would not be good practice on behalf of Maher, would it, sir?

A No, sir.

Q These prepalletized packages that you spoke about earlier -- are you an engineer, by the way, sir?

A No, sir.

A No, sir.

Q Do you have any engineering background at all?

A No, sir.

Q Have you ever tested any kind of pallet in your job as a safety engineer?

A No, sir.

Q Have you ever looked at any engineering books concerning pallets?

A No, sir.

Q Have you ever actually taken two pieces of wood, one from a pine pallet and one from what you call a Maher pallet, and actually made a test of them?

A No, sir.

Q You represent one of the defendants in this case, do you not, sir?

A Yes, sir.

MR.REID: Objection. We are not a defendant.

MR. BRADY: Third-party defendant.

Q These prepalletized pallets, Maher has been in the business of loading and unloading such similar pine pallets for years prior to 1968, haven't they?

A I don't know how many years, sir.

Q There is no doubt in your mind it was certainly at least three years before 1968, isn't that right?

A Yes, sir.

Q That is as long as you were with Maher prior to 1968?

A Yes, sir.

Q These prepalletized pine pallets, they were never strapped, were they?

A Not to my knwoledge.

MR. KLONSKY: Your Honor, I object to that because,though it may not have been done before, that has nothing to do with the safety and integrity of the stow.

THE COURT: Just a minute. I am not following this.

Would you read the question, Mr. Reporter.

(Question read.)

THE COURT: I don't understand the objection.

MR. KLONSKY: What the custom may have been before is not evidence relative to what it should have been in the safety of the stow and the safety of the men working around it.

THE COURT: I thought the question was one which you had yourself put to this witness as to whether these pine pallets had any straps around them.

Is that the question?

MR. BRADY: Yes. Mr. Klonsky certainly asked questions of this witness as to strapping.

MR. KLONSKY: I respectfully submit the question here is posed to say whether it is all right because it was done before, and that is no test.

THE COURT: You haven't heard the question. Read the question again, Mr. Reporter

(Question read.)

MR. KLONSKY: I still voice my objection.

THE COURT: It has no time. What time are you referring to?

Q In 1968 or prior to 1968, to your knowledge, sir.

A No, sir.

Q And Maher regularly and continuously unloaded these unstrapped pine pallets, didn't they, to your knowledge?

A Yes, sir.

Q As a matter of fact, Dole pineapples come in continuously, don't they?

A Yes, sir.

Q Because it is a food product, isn't it?

A Yes, sir.

Q It is a canned goods and it goes all over the country, people all over the country eat it, don't they?

A I would assume so.

Q This is not a casual delivery of dry goods, is it?

A No, it is not.

Q This is something you do regularly and continuously, isn't it?

A Well, according to the season for harvesting, yes, that follows.

Q It is something which is a common practice, isn't that right, or was prior --

THE COURT: What is a common practice?

Q That Dole pineapples would be unloaded by Maher prior to 1968 in an unstrapped, cartonized, prepalletized package.

THE COURT: Do you understand the question?

THE WITNESS: Yes, your Honor.

Q Isn't that correct, sir?

A Yes, sir.

Q You testified before that to take one of these cartons you had to really use a lot of strength to rip it off, isn't that right?

A Generally speaking, yes.

MR. BRADY: Thank you. No further questions.

CROSS EXAMINATION CONTINUED

BY MR. KLONSKY:

Q It can be ripped off manually?

A Yes, sir.

Q How high are these cartons as they sit on this pallet?

MR. BRADY: I will object to that unless there is some foundation.

MR. KLONSKY: This is exactly what he was talking about.

THE COURT: Yes. Overruled.

Q Go ahead.

A I don't know the height. I don't know how many cartons are actually stacked on a unit.

Q These cartons are glued to each other, is that right?

A Yes, sir.

Q They are not nailed together?

A No, sir.

Q They are not strapped together?

A No, sir.

Q They are not banded together?

A No.

Q Do you have an opinion, based on your experience as a safety man, as to whether these pallets, if banded or strapped or even if nailed together, would be more integral and be more sturdy than they were at the time of this accident?

MR. BRADY: I object.

THE COURT: Yes, this witness is not qualified.

MR. KLONSKY: That is all. Thank you.

MR. BRADY: I have just one question, your Honor. May I, please?

THE COURT: Yes.

CROSS EXAMINATION CONTINUED

BY MR. BRADY:

Q You wouldn't expect to nail a carton of canned pineapples, would you?

THE COURT: He is not qualified to testify

as to the strength of any pallet. He has already said that.

MR. KLONSKY: Your Honor, I neglected to ask one question. May I, on the fork lift, which was part of Mr. Brady's examination?

THE COURT: All right.

CROSS EXAMINATION CONTINUED

BY MR. KLONSKY:

Q On the fork lift, is driving a fork lift or Hi-Lo considered a light or heavy job pertaining to longshoring?

A As against --

Q Hold men, dock men.

A From the standpoint of the lifting, a hold man has to lift cartons.

Q Yes.

A And put them from one place to another.

A driver has to drive a machine, and if you want to call it an easier job, I guess it is.

Q Isn't it known on the pier as an easier job, a lighter job?

A I would think that that would be the case.

Q Don't older men usually operate these Hi-Los, men who can no longer work in the hold and lift heavy

cargo?

A Not necessarily.

Q But you have seen this, haven't you, where older men are given the Hi-Lo job because it is an easier job?

A No. The older men usually go on the dock.

Q The Hi-Lo is usually on the dock too, isn't it?

A Not necessarily.

Q But if it is on the dock and works the pier sheds, that would be light work, wouldn't it, compared to the other work on the ship?

A That is hard to say. Some people like to drive and some people don't like to drive.

I am not trying to evade your question, but it is a hard question to answer. It is easier than lifting cases, which is a rough job.

MR. KLONSKY: Thank you.

REDIRECT EXAMINATION

BY MR. REID:

Q Mr. Ponek, I want to inquire about the driving of these Hi-Los. In the warehouses you have cargo stacked in tiers in one place or the other and you

have little avenues that you can drive down?

A Yes, sir.

Q You don't have any rear-view mirrors on these Hi-Los, do you?

A No, sir.

Q When a man is in control and he has to back up in one of these narrow alleyways to pick up cargo, he has to turn all the way around with his neck to see that?

MR. KLONSKY: I object to this. This was the same type of question that your Honor sustained an objection to.

THE COURT: Yes, this witness is not qualified.

Q How does he look back, do you know?

MR. KLONSKY: I object to this. It is still going on the question of the neck.

THE COURT: Yes. This witness is not qualified to testify in that vein.

MR. KLONSKY: A man who was hurt has to go to work.

MR. REID: No further questions.

THE COURT: Thank you. You may leave. You are excused.

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THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Are we ready to resume the testimony of the plaintiff?

MR. KLONSKY: Yes.

J O S E F E R N A N D E Z resumed.

DIRECT EXAMINATION CONTINUED (through interpreter)

BY MR. KLONSKY:

Q Mr. Fernandez, please remember that you are still under oath. I ask that the questions be interpreted in Spanish and you are to give your answers in Spanish.

A Okay.

Q To set the record straight, we discussed primarily your injuries when you last testified prior to calling Dr. Sherman.

MR. KLONSKY: Your Honor, I think we can save some time --

THE COURT: Just a minute. The witness is answering.

MR. KLONSKY: I was giving a statement myself.

THE COURT: Do you want the witness to answer the question?

MR. KLONSKY: Yes.

THE WITNESS: Are you talking about what we were discussing yesterday. I don't remember it at all.

MR. KLONSKY: Your Honor, I think in the pretrial order -- may I be seated when I ask these questions?

THE COURT: Yes, you may.

MR. KLONSKY: Thank you.

In the pretrial order we have a stipulation on page 2 that the medical expenses necessarily incurred totaled $1985.26 to date, so I don't have to ask questions about that. I will accept that figure, $1985.26.

Q Mr. Fernandez, what did you earn when you worked as a longshoreman before this accident? How much a week?

A About $200.

Q $200 a week?

A Are you talking about before my work as a longshoreman?

Q As a longshoreman before the accident.

A I am not sure of the figure, but when I first started to work as a longshoreman I made about

$130 or $140 a week, but I am not sure.

Q What did it come to just before your accident?

A I don't know for sure. I can't tell you.

Q Would $200 a week refresh your recollection?

MR. BRADY: Objection.

MR. REID: Objection.

MR. KLONSKY: He said $200 a week.

THE COURT: Don't you have the records?

MR. KLONSKY: There are so many records here on earnings, I thought we might be able to get a figure and let it stay at that, but if they want the income tax returns, I have got them.

Can we approximate $200 a week at the time of the accident?

MR. BRADY: No.

MR. KLONSKY: What does my adversary say?

MR. LARSEN: I don't know.

MR. REID: No.

MR. KLONSKY: No stipulations, all right.

I offer in evidence this packet of income tax returns for 1968, '69, '66 --

THE COURT: Just a minute. Are you

starting with 1966?

MR. KLONSKY: Yes, I am trying to get these together now, your Honor. May I have a moment?

THE COURT: Yes.

(Pause.)

MR. KLONSKY: I have here '68, '69 and '66.

THE COURT: Any objection?

If not, let them be received.

MR. BRADY: May I see them, please.

MR. KLONSKY: I cannot find '67. I have here something that may help us. I have here records of the New York Shipping Association to indicate that there are two quarters in 1967 --

MR. REID: Just a minute, please.

MR. KLONSKY: Why?

MR. REID: Your Honor, may we have a few minutes to look over these records before we go on to something else?

THE COURT: Yes, you may look over the tax records.

MR. REID: Thank you.

MR. LARSEN: Your Honor, Mr. Klonsky has handed counsel at this table federal income tax re-

turns for Mr. Fernandez for the years 1966, '68, '69, to which we have no objection.

THE COURT: All right, let them be received, Plaintiff's Exhibit 7, as one exhibit.

(Plaintiff's Exhibit 7 was received in evidence.)

xx MR. KLONSKY: I wish to have these gentlemen look at this.

MR. LARSEN: No objection, your Honor.

MR. KLONSKY: Perhaps I could read this into the record. I offer in evidence a photostatic copy of a paper pertaining to the last two quarters in 1967 and the first two quarters in 1968 of the earnings of this plaintiff.

THE COURT: Let's have the source of that paper.

MR. KLONSKY: New York Shipping Association records. The earnings of all longshoremen are related there. The figure is $10,038.86.

May we have this marked in evidence.

THE COURT: What was the period it covered again?

MR. KLONSKY: The last two quarters in '67 and the first two quarters in '68. That would be

just prior to the accident, which occurred in September of '68.

THE COURT: That will be marked as Plaintiff's Exhibit 8. There being no objection, let it be received.

(Plaintiff's Exhibit 8 was received in evidence.)

BY MR. KLONSKY:

Q Mr. Fernandez, after this accident, when you went back to work, did you drive a Hi-Lo?

A After the accident, sir?

Q Yes.

A I returned, but I did not return to work to drive a Hi-Lo. I went to the warehouse to work as extra labor. I worked thereafter up until the month of April.

Q You did what? I am sorry. I didn't get that.

A Work.

Q You worked until the month of April of which year?

A I worked there until the month of April. I was injured in 1968; it must have been '69. I returned to work in '69.

Q Did you at any time after 1969, when you returned to work, operate a Hi-Lo in the hold of a ship?

A No, I did not drive any Hi-Lo after that.

Q Did you drive a Hi-Lo on the pier?

A I have only been a driver for the last four years since I came into this company.

Q When you were a driver these last four years, did you ever drive on a ship?

A Only in the warehouse.

Q Tell us how -- strike that.

Do you recall having seen any of these cartons of pineapple falling on your body when you had your accident?

A I saw nothing.

Q But the information you have was given you by your co-workers, is that true?

A All I know is that I found myself on the main deck of the vessel.

MR. KLONSKY: That is all. Your witness.

THE COURT: All right, gentlemen.

CROSS EXAMINATION

BY MR. REID:

Q Mr. Fernandez, do you remember coming to

our office at 19 Rector Street in New York and testifying under oath on April 11, 1974 about your case?

MR. KLONSKY: Mr. Reid, I will concede that those questions were asked and those answers were given at that time.

MR. REID: To save time, I will read from the plaintiff's deposition.

THE COURT: All right.

MR. REID: Your Honor, could we have an instruction to the jury in connection with the reading from the testimony of a witness.

MR. KLONSKY: I think you have already done that, your Honor.

THE COURT: I will repeat it. As I told you before, ladies and gentlemen, before a case of this kind comes to trial, the lawyers are permitted to take the testimony of opposing parties and prospective witnesses under oath which may then be used on the trial for certain purposes.

In this case Mr. Reid is about to read the deposition of the plaintiff taken by him prior to trial, and he is permitted to read that in evidence.

All right, proceed, Mr. Reid.

MR. REID: I would like to turn to page

No. 22, Mr. Klonsky:

BY MR. REID:

Q "Now, we had asked him what the size of the pallet was."

MR. KLONSKY: Would you read that as it is, Mr. Reid?

Q "Now, we had asked him what the size of the pallet was.

"Could you use your hands and we will measure it off.

"(Witness uses ruler.)

"Q Is it four feet?

"A (In English) Maybe four feet square.

"Q About 4 x 4?

"A I don't know. This is approximately so.

"Q Of what material was the pallet constructed?

"A I don't know.

"Q Could you tell us whether it was wood or metal?

"A Really I don't remember. Maybe it was wood.

"Q Could you tell us how it was constructed?

"A I don't remember."

MR. KLONSKY: Your Honor, I understand

that the questioning from a deposition is to contradict what a witness has stated.

THE COURT: Not in the case of an adverse party. It may be used for any purpose.

MR. KLONSKY: He says he doesn't remember so there is no purpose at all.

MR. REID: On page 23:

"Q Was the pallet solid or did it consist of slats?

"A No, that I cannot tell you.

"Q Now, you told us the outside dimensions of the pallet. Now,can you call us how thick it was?

"A I don't remember, and I want you to know that the size was approximately."

Down to line 16 on page 23.

MR. KLONSKY: Could you also note for the record, Mr. Reid, that this was through an interpreter?

MR. REID: Yes, this was through an interpreter. It was acceptable by all of the parties who attended the deposition as to be a qualified interpreter.

Line 16 on page 23:

"Q Did you ever see one of these pallets without any cargo on it.

"A Maybe I have seen one, but I do not remember.

"Q Looking sideways at one of the pallets, could you see all the way through the pallet?

"A This I cannot tell you, sir."

On page 24, question on line No. 17:

"Q Well, did this pallet on that particular day of your accident have any thickness? Could you estimate the thickness of the pallet?

"A No, I cannot tell you how thick it was. I don't know.

"Q Did you notice as to whether or not the pallets had any nails in them?

"A I don't know.

"Q Did you have any metal or wooden -- did they have any metal or wooden braces on them?"

Answer on the top of page 25, line 2:

"A I don't remember.

"Q Did the pallets have any side pieces which came up from the pallets?

"A I don't know."

Question, line No. 13, page 25:

"Q Well, were there any ropes or wires which were attached which were firmly attached to the pallet?

"A I do not remember that.

"Q Could you tell us how many cartons were on the pallet?

"A That I cannot tell you.

"Q How high did the cartons stand up from the pallet?

"A Approximately five feet, but there were some that were smaller and there were some that were larger.

"Q Referring to the pallet?

"A Yes.

"Q And the weight they were?

"A I don't know the weight.

"Q Now, you have stated that some of the cargo on the pallets was stacked higher than the others, is that right, that some of the cargo on the pallets was stacked higher than the other pallets, is that right?

"A They were not all even because some -- they came full and some were not full, that I remember."

Question on page 26 --

MR. KLONSKY: What line?

MR. REID: -- line No. 19:

"Q In other words, what you are saying is all

the way across it is even on the top, is that what you mean?

"A You have asked me if they were all the same height and I told you that I had seen that some they have more, some boxes, and so they are higher, and some bring less boxes and so they are lower."

MR. KLONSKY: You are leaving out some words, Mr. Reid. I don't think it is pertinent, but please read it exactly.

MR. REID: What line was that?

MR. KLONSKY: Lines 21 through 24.

MR. REID: I will read it over.

"A You have asked me if they were all the same height and I told you that I have seen that some they have more, more boxes, and so they are higher, and some they bring less boxes and so they are lower."

MR. KLONSKY: Thank you.

MR. REID: "Q How high was the highest pallet stacked with cartons?"

The top of page 27:

"A I don't remember, but it would be approximately five feet.

"Q Could you tell us whether or not, as the cartons as stacked on the pallets, that they were even all

the way across on top or that they were irregular?

"A That I don't know. I don't remember that. You are working there and you cannot remember.

"Q Could you tell us how the pallets were stowed with reference to one another in the lower hold of No. 3 hatch?

"A They were one next to the other at the same level.

"Q What about any being on top of the others? Were there any on top of the others?

"A Yes, I believe."

On page 28:

"Q How did you go about getting these pallets with the cartons on them out of the hold of the ship?

"A With the bridle comes and holds the pallet and brings it up.

"Q Now, describe the bridle which was being used on the day of your accident which discharged these pallets to which you referred.

"A Really, they were like every other that was there, but I don't know how to describe it.

"Q Well, what was the bridle, of what material was it? Was it rope or was it wire?

"A They usually are of steel, but I don't

remember the material of that particular one.

"Q Now, would you tell us whether the bridle is what is known as a square bridle; in other words, it is a square shape with rope or wires hanging down from each corner?

"A I don't remember.

"Q Did the bridle consist of two slings, wire slings, one sling under one side of the pallet and the other sling on the other side of the pallet, married to a cargo hook?"

This is on the top of page 29:

"A They were two steel bars" --

MR. KLONSKY: "They are two steel bars."

MR. REID: "They are two steel bars and at the end there are wires of steel."

"Q And one wire went under one side of the pallet and the other wire went under the other side of the pallet?

"A Yes. The two of these bridles, they go under the pallet and they hold it.

"Q Now, these cartons on the pallet, were the cartons made fast to the pallet in any way by strapping, by metal straps or ropes or any other material?

"A That I couldn't tell you because I don't

remember."

MR. KLONSKY: Would you read the balance of that page, Mr. Reid?

MR. REID: I prefer you do it.

MR. KLONSKY: May I read in context the balance of the page?

THE COURT: Yes.

MR. KLONSKY: "Q I want you to tell me exactly what happened to you at 12:30 on September 1, 1968."

MR. REID: I object to his reading from my deposition. I haven't asked him anything about the accident which occurred.

THE COURT: I thought you said you are reading something which is in context of what was read?

MR. KLONSKY: Yes, ma'am.

THE COURT: He asked him about the pallet.

MR. KLONSKY: This is his recollection of what there was on that ship. Where he keeps saying "I don't remember," that is pertinent to what I wish to read now in context, which apparently Mr. Reid doesn't want to read.

THE COURT: All right. Proceed.

MR. KLONSKY: Thank you.

"Q I want you to tell us exactly what happened to you at 12:30 on September 1, 1968.

"A That is when I had my accident.

"Q That is what we want to know about.

"A If you want me to be truthful and I am swearing, I do not remember what happened to me. I lost consciousness and I found myself on the deck of the ship."

MR. REID: The question following that:

"Q What were you doing immediately before you lost consciousness?

"A We were just finishing to hold the cargo to be hoisted up.

"Q Could you tell us whether or not you saw the cargo being hoisted out?

"A Sir, after you grab, after you finish grabbing holding the cargo, when it starts being hoisted, you first look and then you go back just to be away from it.

"Well, I don't know how it happened. We were just finishing unhooking there. There is no space, no space to move" --

MR. KLONSKY: "No place to move."

MR. REID: -- "and no place to move, that's all I remember.

"Q Were you doing any of the hooking?

"A I was hooking.

"Q And by hooking you mean hooking on the bridle?

"A Yes.

"Q Was anybody else hooking on the bridle?

"A Yes.

"Q Do you remember the name of the person?

"A No, they were colored people whose names I don't know."

MR. BRADY: "I didn't know.

MR. KLONSKY: Let's read that again.

MR. REID: "No, they were colored people whose names I didn't know."

On page 34 --

MR. KLONSKY: What line?

MR. REID: -- line No. 14:

"Q And did you make a report to any of the ship's officers, any of the ship's crew or officers, before you left the ship?

"A No, I don't remember nothing at all."

On page 40, line No. 11:

"Q How did you feel right after your accident?

"A When I was in the hospital?

"Q Before you got there, after the accident.

"A I had at the first moment I was feeling all right. In other words, I had all the strength that I had before."

MR. KLONSKY: Mr. Reid said, "Maybe he didn't understand my question. Would you ask it again, Mr. Reid?

MR. REID: "After your accident, right after your accident, how did you feel?

"A No, then I was not feeling well.

"Q Well, tell us how you felt.

"A I had some disorder, some disturbances all over my head.

"Q Anywhere else?"

The top of page 41:

"A I had two or three parts of my head that were swelling and pain on my right shoulder and the lower part of the back.

"Q On which side of the back?

"A On the same spine place (indicating).

"Q Is that the right?

"A No, in the center (indicating).

"Q Any other place in your body

"A Behind my head."

On page 42, line 4:

"Q When did you next after April of 1969 become a steady member of a gang?

"A No, I was not on any gang as a member.

"Q And is that up to the present time,too?

"A I work now steady at Universal Company, but I am not a member of any gang.

"Q But you are a steady worker for Universal?

"A In the house,yes.

"Q What do you mean by 'in the house'?

"Mr. DiCostanzo: He means in the shed."

MR. KLONSKY: Mr. DiCostanzo is my partner, your Honor, and he was present at this EBT.

MR. REID: On page 48, line No. 20:

"Q How do you feel today?

"A Well, today I feel well."

No further cross examination.

MR. KLONSKY: Can I read something in context?

THE COURT: Yes.

MR. KLONSKY: He was asked about what work he did since April of 1969. On page 41, these

questions, line 11:

"Q When did you next go back to work?

"A I don't remember exactly. I did but it was in the month of April.

"Q What year?

"A 1969."

THE COURT: All right, is there any further cross examination of plaintiff by any other party?

MR. KENNY: I have none, your Honor.

CROSS EXAMINATION

BY MR. LARSEN:

Q Mr. Fernandez, where were you working in the No. 3 lower hold before you were injured?

May I add to the witness to help the witness?

A On this day I worked with the same gang in the hold.

Q Just before your accident were you standing in the square of the hatch?

A I was hooking on the draft, the draft which was down there.

Q Was the draft in the square of the hatch?

A I can't tell you. I don't know.

Q Well, from where you were standing, had you looked up would you see the sky?

A I looked on the draft and I can't tell you the position that I was in.

Q Was there a ceiling or an overhead over your head when you hooked up the draft?

A No, I can't tell you.

Q Was it open?

A In order for the draft to go up it must have been open.

Q Now, after you hooked the bar on to the pallet did you step away from it?

A I couldn't do much. The drafts of these palletized cargo, there isn't much space; perhaps two feet. The hatch was still full of palletized cargo on that side. There was no place to hide.

Q How much space was there between where you hooked on to the pallet and the nearest stow of cargo?

A I can't tell you.

Q Could you walk into the wing of the hatch just before the accident?

A What do you mean by the wing? I don't

understand you.

Q Into the side of the ship.

A There was no space at all. There was cargo all around the hatch and I think that the cargo was stowed maybe two or three high of these palletized cargo.

Q Did anyone before the accident, at any time when any of the drafts were being removed, tell you to stand clear?

A Where was I going to stand clear? There was no place. I am sorry. There was no space at all. We were just starting to discharge this cargo. We had just begun discharging this cargo up there and there was no space.

Q When you first went down into the hold, did you work on top of the cargo?

A I can't tell you that, whether I did or not.

Q At any time during the morning, from the time you worked until the time of your accident, were you told to stand clear of a draft as it was being lifted?

A I don't remember anything about that.

Q Was there any man in the hold that was giv-

ing directions with respect to the liftinf of the drafts?

A It was about lunchtime, and down in the hatch nobody told me anything about directions at all.

Q Before your accident and -- withdrawn.

Before your accident and when other drafts were being lifted, were they lifted with you standing underneath them?

A I don't remember.

Q Is it your testimony that there wasn't room for you to get out of the way as a draft was lifted during the working hours of September 1, 1968?

A I don't know what you mean by that, sir.

Q Before your accident did you stand under drafts as they were being lifted out of the square of the hatch?

A We were working correctly. We were taking out the drafts.

Q At any time would you stand under a draft as it was being lifted? That is my question.

A You had to work down there and [illegible] in that hatch there was no place for you to go to any side.

Q You didn't have the room, in that what you

are saying?

A Exactly.

Q Did you complain about the lack of any room to work in to anybody at Maher Stevedoring?

A I am sorry, but I didn't complain about anything.

Q You didn't complain to anyone at all?

A I don't remember anything about that.

Q Did you hear anyone else complain that was working in the hold?

A I don't remember.

Q Where you were working in the square of the hatch or in the hold, could you see the winchman up on the main deck?

A I can't tell you. I don't know.

Q What is a signalman?

A There is a gentleman who gives signals on the main deck.

Q Could you see him from where you were working in the hold were you to look up?

A Yes, you have to see him.

Q Did he call down to you or people you working with during the morning of September 1, 1968 for any reason?

A To me, no, sir.

Q To anyone?

A I don't know.

Q Did he ever call down to you or anyone else in the gang to stand clear?

A To stand clear of what?

Q Of the draft which was being lifted.

A I don't remember anything about that, no.

Q Do you admit that you should, as a longshoreman of experience, stand clear of a draft as it is being lifted if you had the room?

A There wasn't any room.

Q I am saying if you had the room.

A We were just beginning in the square and there wasn't any room.

MR. LARSEN: I have no further questions.

THE COURT: Any further cross examination of this witness.

MR. BRADY: May I ask some questions, your Honor?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. BRADY:

Q Mr. Fernandez, you had discharged cargo of

pineapple prior to the date of your accident, hadn't you?

A Yes, sir.

Q I understand it was your job to be the hooker, is that right?

A When they sent me to hook on, I would hook on.

Q Before you hooked it on, that load, was that brought by a machine over to the place where you were, sir?

A The machine would take them out and bring them to the square and we would hook them on in the square.

Q Yes, sir. My question is, the last load that you hooked up, was that brought out by a machine, and I mean a Hi-Lo?

A I don't remember that.

Q Where you were standing, were the loads brought out by machine to the place where you were so they could be hooked up?

A I was on the side of the draft to hook it on.

Q I'm sorry. My question was, was the load which you were to hook on -- was that brought to the place where you were by machine?

A I don't remember that.

Q As part of your job as hooker, you have to do the job right, don't you?

A What do you mean by right?

Q Well, you have to hook it up so that it is done in the right way, so it is correctly hooked up?

A I don't know what you mean. Please explain it. You are not explaining anything at all.

Q Do you know what the word "right" means, sir?

MR. KLONSKY: Your Honor, I object to this. I believe that a description of what he means by right should come from the interrogator so that the witness will understand what he is talking about.

THE COURT: Yes, it calls for a conclusion on the part of the witness. We don't know what right is from wrong. Have him explain his duties.

BY MR. BRADY:

Q Is there a way to perform your work as a hooker?

THE COURT: Ask him what his work is and how he hooks it on.

Q Would you please tell the court and the jury what you do, sir, when you hook it up?

A This is the bridle. I put the bridle in the pallet and put the man on the winch picks it up. The laborers in the hatch separate. And that is the way the job should be done right, as you are trying to tell me, sir. I am not looking for accidents.

Q I am not trying to tell you anything.

A That's right, because I was injured. Others have been injured and this is the way I am.

MR. BRADY: Your Honor, may I move to strike that last response as unresponsive.

THE COURT: Yes.

Q Mr. Fernandez, in any event, if the bridle isn't brought under the pallet, then an accident can happen, can't it, when the load is brought?

MR. KLONSKY: If something is put onto a pallet an accident could happen. There is no foundation for that.

THE COURT: You can ask him if it is not so that if the bridle isn't put on an accident can happen.

MR. BRADY: If the bridle --

THE COURT: Is that the question to the

witness?

MR. BRADY: Yes.

THE COURT: You can ask him that. Ask the witness the question in Spanish and let him answer.

MR. KENNY: I will object to that question. It is a hypothetical question and this man is not an expert witness. I object to the form of the question.

THE COURT: Overruled.

MR. KLONSKY: May we have that question read back, your Honor?

(Question read.)

A. I put it in its place.

THE COURT: Explain to him that it is a hypothetical question.

MR. BRADY: Your Honor, I think I will withdraw it.

MR. KLONSKY: Your Honor, Mr. Brady withdraws the question.

THE COURT: All right.

MR. BRADY: Will your Honor permit me to review the EBT for a moment? I think there is a portion which I would like to read. We were not present at this examination before trial.

THE COURT: All right.

MR. BRADY: Thank you. May I have a few moments, your Honor.

THE COURT: Yes.

(Pause.)

MR. LARSEN: Judge, are we due for a recess? I forgot I was supposed to call my office with respect to a trial engagement.

THE COURT: We weren't due until 11:30.

MR. LARSEN: I can wait until then, if you wish.

MR. BRADY: I am sorry, your Honor. I don't seem to be able to find it.

THE COURT: Pardon me?

BY MR. BRADY:

Q Mr. Fernandez, you drive a fork lift truck now, sir?

A Yes, I do.

Q Do you sometimes drive in reverse, sir?

A At times, yes.

Q When you drive it in reverse, don't you have to turn around to see where you are going?

A I have to turn around, yes, that's right.

Q You do that every day, don't you?

A I drive the Hi-Lo every day, yes.

Q On a regular basis?

A As far as I am concerned, I drive the Hi-Lo normally, regularly.

Q In driving you also have to look to your left and to your right, is that right?

A Yes, I turn very carefully and I also look back.

Q You have been doing that for over four years?

A I spent about two years working as a cleaner in the yard, and now I have been working for two years in the warehouse.

Q As a cleaner in the yard, did you also use the machine to do that, sir?

A From time to time, yes, sir.

MR. BRADY: I have no further questions.

THE COURT: Anything further?

REDIRECT EXAMINATION

BY MR. KLONSKY:

Q Mr. Fernandez, do you take any medication for your condition?

A Medicine for what?

Q For your neck and for your head.

A They gave me a lot of medicine at the clinic in Lafayette.

Q How long did you go to that Lafayette clinic?

A I used to go two days a week.

Q For how long?

A Sure I don't know, but about four, five months.

Q Do you use the medicine they prescribed for you?

A The only medicines they gave me was the medicines at the pharmacy in the Lafayette clinic.

Q Do you still use that medicine?

A No, sir. They are not giving it to me any more, because they have discharged me.

MR. BRADY: Objection to this, your Honor.

THE COURT: Pardon me?

MR. BRADY: Withdrawn.

Q Mr. Fernandez, when you turn around to the right or to the left to see where you are going, or behind you, how does your neck feel when you do that?

A I turn my body a little at a time, a little at a time.

MR. KLONSKY: Thank you

* * *

H O W A R D B A L E N S W E I G, called as a witness by defendant and third-party plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. REID:

Q Doctor, are you a doctor of medicine?

A I am.

Q Are you admitted to practice in the State of New York?

A Yes, I am.

Q Could you tell us when and where you attended medical school?

A I graduated from Cornell University Medical School, which is in New York City, in 1946.

Q Where have you practiced since 1946?

A In New York City, 667 Madison Avenue, since 1953. Before that I was in training as an orthopedist.

Q What is your medical specialty, doctor?

A I am an orthopedic surgeon.

Q Could you tell the jury a little about what an orthopedic surgeon is?

A Yes. We diagnose and treat injuries and diseases of the musculoskeletal system, which means your

bones, joints, muscles and any adjacent structurs that affect them.

Q Have you done any graduate work, doctor?

A I took an orthpedic residency at the Hospital for Joint Diseases from 1949 to 1952. Following that I had a fellowship in orthopedics, traveled through Europe for about six months, 1952 to '53, and since that time I have been teaching at New York Hospital in fractures and as one of the assistant attending at the Hospital for Special Surgery. I teach orthopedic residents.

Q Are you familiar with x-rays?

A Yes.

Q Taking them and interpretation of x-rays?

A It is a fairly large part of orthopedics. Additionally, I was the head of the Camp Kilmer Army Station Hospital, radiology department, for a year and a half before I became an orthopedic resident, and while I was at Hospital for Joint Diseases during one summer I ran the x-ray department when the chief of radiology went on vacation.

Q Are you associated with any hospitals?

A Yes, I am.

Q What hospitals?

A I am assistant attending surgeon at New York Hospital and at the Hospital for Special Surgery.

Q Doctor, at my request did you examine the plaintiff in this case, Mr. Jose Fernandez, on August 22, 1974 through an interpreter?

A Yes, I did.

Q Could you tell us, did you make a physical examination of him and an orthopedic examination?

A Yes, sir.

Q Would you tell us what you did, doctor?

A Yes. As far as complaints were concerned, his daughter served as interpreter and she indicated that he complained of pain in his low back and that since going back to work he had been working driving a Hi-Lo in the warehouse rather than working in the hold as a longshoreman, that he avoids bending because it makes him dizzy and he complains of headaches on occasion.

I had him undress completely. Inspection of his head showed pupils that were small but responded normally to light. His hearing was intact. His neck was normally outlined. It moved cautiously, but with encouragement I finally was able to obtain fairly normal range of the neck motion, with slight defects

of extension and flexion.

He turned to the right 80 degrees, which is 10 degrees short of the average normal, and to the left 90 degrees.

Side bending was 20 degrees.

Q Doctor, could that be normal for a man who is in his 50s?

A 55 when I saw him. Yes, it is normal.

Q Continue, please.

A He did not complain of any tenderness over his neck. He told me that his shoulders bother him. He did not tell me that when I asked him questions about what bothered him, but at this point he did.

He complained of tenderness when I felt around his shoulders. No specific spot, mostly anteriorly.

Then I asked him to move his arms and he did rather slowly, but then he finally went through complete ranges with both shoulders.

I examined his shoulders by manipulating them. I did not feel any creaking in the shoulder joint. There was no muscle atrophy.

I then did a neurological examination of his upper extremities, and he told me that he couldn't feel the pin over the tips of the fingers of his left

hand and over the back of the fingers of the left hand, that the pin prick was dimiished in the palm of his hand on the left side, diminished up to the elbow.

There were no muscle atrophies and I did not see any explanation for those sensory changes.

I then examined his trunk. He showed moderate bunions and moderate flat feet. His trunk posture was normal. The trunk muscles, when he was standing with his back to me, were held tight, but when I asked him to lean backward, they relaxed completely.

Q Was that a normal extension?

A The first time he extended 10 degrees, which is normal for a 55-year-old, a little bit less than normal for a younger person. The second time he did it zero.

I had him bend to the right and to the left. He did that 20 degrees. That is somewhat incomplete. The average normal is 30. When you get to be a bit older you may limit it a bit, but I consider that a little less than normal.

He bent forward completely. He was able to reach the floor. His trunk went through a range of 90 degrees. It was only when he bent forward that he made any complaints and then he complained at the lumbosacral angle which is the lowest part of your

back, just above the pelvis.

I had him lie down and examined him lying down. The circulation was all right. There were no weaknesses of his toes.

Passive straight-leg raising, which means by picking his foot up, was through a range of 70 degrees, at which point he complained of pain in his low back. Seventy degrees is normal. His hips and his knees were normal.

I measured his legs in length and circumference and they were equal.

I again did a neurological on his legs. The reflexes were normal, the knee jerks were 3-plus, the ankle jerks were between 1 and 2-plus.

When testing with a pin he complained of loss of snesation over the entire left leg except for the left lateral thigh. That is not the sort of pattern we see with any sort of nerve damage.

I had him turn face down and palpated him and he complained of tenderness over the spinous process of lumbar 3. That is the middle of your lower back.

When he bent forward he com plained of pain in the lowest part of the back, and yet when I

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palpated him he complained of tenderness in the mid-portion of his lower back.

I then x-rayed him. I x-rayed his neck. The x-ray showed some arthritic changes, more on the left side than the right in the lower neck, in the front view. In the side view he showed some narrowing of the disk space at C6-7 -- that is the lowest disk space in your neck -- with spurring anteriorly, producing basically a spontaneous fusion, it bridged it.

Q Would you explain that a little more fully, doctor?

A This an aging process. At least half of the people over the age of 40 will show some arthritic change or some narrowing of the disk space by the age of 40. By the age of 50 I would expect to find it, in the United States at least, in at least 80 to 90 per cent of everyone here, and so finding one disk narrowed at C6-7, with spurs,is not the least bit unusual for a 55-year-old. It is normal wear and tear and aging.

There were no fractures noted on his x-ray. I took an oblique view and the left oblique showed some narrowing of the nerve root outlet, which we call the foramen, between C7 and dorsal 1. The reason I x-rayed his neck was because I couldn't explain the

numbness in his left hand and finding a narrowed foramen at C7-D1 does not explain it because that C7-D1 has the eighth cervical nerve come out and that goes only to the underside here (indicating), and a little bi down to here, so it doesn't explain the numbness over the whole hand.

I x-rayed his shoulders. His shoulders were normal.

I x-rayed his lumbar spine -- that is, his lower back -- and he showed very minimal degenerative changes. By that I mean aging spurs. They were very slight and less than average for his age and occupation.

There was a possibility of a defect in the posterior elements of lumbar 5. I did not take oblique views so I can't be sure whether or not he might have some congenital defect there.

Q What is a congenital defect?

A Something you are born with.

I then had an opportunity to review some records --

Q Before we go on to that, doctor, let me ask you this question. You had a history, did you not, that this man had been in an accident?

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A Yes, sir.

Q Could you tell us whether or not you found any residuals of the accident to his cervical spine?

A No, I did not.

Q What encompasses the cervical spine? Would you show the jury?

A It runs from the base of your skull down to the top of your shoulders (indicating).

Q Did you find any residuals from an accident in regard to his shoulders?

A No, I did not.

Q What did you find in respect to his lumbar spine?

A I found that he moved fairly normally for his age, bending down and touching the floor; going through a range of 90 degrees is better than agerage for a 55-year old.

His x-rays looked a little better than average for a 55-year-old, and the only thing I found was that he complained of some soreness when he bent forward he tended to tighten his muscles during the course of examination.

Q That can be voluntarily produced, doctor?

A Yes, sir.

Q You had no history of an injury to his left arm, did you, doctor?

A No, I did not.

Q You had no history of any injury to his left leg?

A No, sir.

Q Doctor, would you tell us whether or not you found any related permancies?

A I found no orthopedic permanencies. I found unexplainable numbness in the left hand and left leg.

Q Is this the plaintiff sitting here?

A Yes, sir.

Q Have you examined over a period of years, doctor, longshoremen?

A Yes, I have.

Q You have examined longshoremen who worked in holds of vessels?

A Yes, sir.

Q Looking at this gentleman here from a medical point of view, would you think that he is quite a small man to work in the hold of a ship?

A I do.

MR. REID: You may examine.

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CROSS EXAMINATION

BY MR. KLONSKY:

Q Dr. Balensweig, you left out one important qualification that you have: the training that you have by your father. I trust he is well.

A He is fairly well and playing golf daily.

Q Now, sir, you did not perform a neurological examination of his complaints here, did you?

A I did not perform a detailed neurological as far as head injury was concerned. I did an adequate neurological for neck and low back injury.

Q Did you have occasion to see the hospital records in this case?

A Just now.

Q And do you see the findings that the hospital made?

A Change in the EEG, possibly secondary to a conclusion.

Q What about the myositis, cervical myositis?

A That is put in there. That is not a neurological finding.

Q That would be orthopedic?

A Right.

Q Do you agree that a trauma to a man's neck

and head by falling cartons or cans of pineapple can be a competent producing cause of a cervical myositis?

A Permanent?

Q Competent producing cause.

A Yes.

Q The competency depends on whether you agree or disagree with respect to his complaints, isn't that true?

A No, I think that after a certain length of time you should be able to find some objective findings.

Q You found objective findings here in his neck, didn't you?

A I found --

Q Narrowing of the C7 disk space?

A Yes.

Q Now, you say that it could have been caused by his aging, didn't you?

A I attributed it to his aging, yes, sir.

Q Could it not also be attributed to trauma?

A C6-7, it is not in the area where trauma generally causes pathology. That is usually C4-5 or C5-6.

Q Do you know where he was struck by these falling cans?

A Over his head. He had a laceration there.

Q Elsewhere?

A He had a laceration over his scalp.

Q Was he also complaining of being struck elsewhere?

A I couldn't read the records well enough to determine whether he complained of being hit over his shoulders.

Q If a can coming from a distance of about eight to ten feet struck him in the area of the lower cervical spine, would that be a competent producing cause of the narrowing that you saw?

A I don't think so.

Q Is it not true that if you have nontraumatic findings of arthritis, they are generalized throughout the body?

A No. The first aging in the neck occurs C5-6, C6-7. The first aging in your lower back occurs at L5-S1, L4-5, and then they progress upward.

Q But there is a school of thought, is there not, that when you pinpoint arthritis in one place and don't find it diffused elsewhere and there is a history of a blow to that area, you could state with reasonable medical certainty, without being positive, that a com-

petent producing cause of that singular area was prompted by trauma, couldn't you?

A I think that theory is one I wouldn't ascribe to.

Q You don't ascribe to that?

A I wouldn't ascribe to that one. If you can show me a change, in other words, if you can show me an x-ray taken at the time of the accident and then I can compare it with mine and see a rapid change, I will accept that as being related to trauma.

Q Unfortunately we do not have such x-rays here.

A Okay.

MR. KLONSKY: Have you got the hospital record, Mr. Reid.

Thank you.

Q They did x-ray him though at this hospital with respect to his compláints of pain in the cervical spine. There is no date here, but it was while he was a hospital patent at St. James, and they say:

"Cervical spine. No evidence of fracture, dislocation or bone destruction. Disk spaces, apophyleal joints and antervertebral foramen are preserved. Minimal arthritic spurring is present in

the lower cervical spine."

Is that what you found?

A I found spurring in the lower cerfical spine of C6-7.

Q Was it minimal?

A With narrowing. I don't know whether the x-rays show it or not.

Q They don't refer to narrowing here, do they?

A No, they don't.

Q So we do have a record of an x-ray taken shortly after an accident which is somewhat different than the ones you took in 1974?

A I don't know.

Q Could not trauma be an accellerating or a precipitating cause of a worsened condition?

A It can be,yes.

Q Where we all have arthritis as we age, we don't all have pain from that arthritis, do we?

A No, we don't.

Q But trauma could cause pain and make it manifest?

A Yes.

Q Now, when there is right shoulder pain in

the certical disk narrowing, would it not perhaps be concluded that there was a radiation from the neck to the shoulder?

A You have to pick the level. C4-5, C5-6 going to the shoulder; C7-D1 does not.

Q But it is true, is it not, that the cervical area takes care of the upper extremities, the dorsal spine takes care of the chest and back and the lumbar spine takes care of the lower 5th vertebrae as well as the sacrum, is that true?

A Yes.

Q So you also found a narrowing down -- at what the number was that?

A I didn't find any narrowing in his lumbar spine.

Q I thought you said you did?

A No.

Q What did you find in the lumbar spine?

A Minimal degenerative changes.

Q Minimal degenerative changes. Just in that spinous area alone?

A The whole spine showed very early aging changes.

Q The entire lower spine?

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A Yes, sir.

Q Do you see that in any other part of the cervical spine except C6 and C7?

A Not that I recollect. I will look.

Q And also would you look for the dorsal area too?

A I didn't take his dorsal area.

There is slight aging changes in the rest of his neck.

Q The rest of his what?

A Of his neck.

Q Would you look at the L5 area?

A It is very normal.

Q It is what?

A It is very normal.

Q Let me read to you from your report and see whether you agree with what you wrote yourself in 1974 as compared to what you are testifying to now:

"Lateral view of lumbar spine and separate spot lateral view of the lumbosacral angle show a few minor spurs off the lumbar vertebrae. Patient has calsification of the lower abdominal aorta. Disk spaces are well maintained. There is a possibility of a defect in the posterior elements of lumbar 5.

There is no evidence of a spondylolisthesis. There is some exaggeration of the lumbosacral angle."

That is not what you just testified to, is it?

A This is within the range of normal.

Q But you did not mention various other things?

A I did testify about there being the possibility of a defect during direct testimony.

Q When you talk about the exaggeration of the lumbosacral angle, what do you mean?

A He has swayback. That is really a normal variant.

Q But the plaintiff did complain to you relative to pains in various parts of his body, did he not?

A Occasionally. Not very often during the examination.

Q Did you maintain a good lingo or rapport with this patient?

A I speak a little Spanish and I think I was able to communicate with him, yes.

Q You had an interpreter there, which was his young daughter?

A She wasn't there during the examination

though.

Q Doctor, though we all have arthritic changes, trauma can do things to make those arthritic changes painful and progressive, isn't that true?

A It can. You have to prove it.

Q Well, in the first place, you have got a history that there was no preexisting conditions of this nature in the history of this man, isn't that true?

A Yes, sir.

Q Are you familiar with the record kept by the Marine Index Bureau of prior injuries to longshoremen?

A I am.

Q They keep a fairly good record of that, don't they?

A Very good.

Q This man was registered with this Marine Index --

MR. REID: I object, your Honor.

MR. KLONSKY: He is familiar with this, your Honor.

MR. LARSEN: First of all, the longshoreman is not registered with them. Second of all, the question is out of order.

MR. KLONSKY: I don't think the second has anything to do with the case and the first is wrong.

THE COURT: Overruled.

Q Dr. Balensweig, you examine frequently for steamship companies, do you not?

THE COURT: Wait a minute.

MR. KLONSKY: I am going to this issue.

THE COURT: I thought there was a question to the witness.

A From my knowledge, they have been on seamen. I do recollect some indexes, I don't know ifthey are marine indexes, which included both car accidents and shipboard accidents in people who have been at times seamen.

Q What about longshoremen?

A I haven't seen -- I know there is a record kept, but I don't think it is called the Marine Index of Longshore Injuries.

Q There is an official index kept of prior injuries of longshoremen, isn't that true?

A Yes, sir.

Q The attorney here who referred you to examine Mr. Fernandez did not furnish you with any

evidence that there was a preexisting injury while he was a longshoreman,did he?

MR. REID: I object to that, your Honor. I am under no obligation or duty at all. The patient gives his history at the examination. I am under no duty at all.

THE COURT: The question did not call for that answer. The question was whether you in fact gave this doctor any such evidence. Overruled.

A I did not receive one.

Q Did he cooperate with you while you tested him?

A At times, yes; at times, no.

Q When you originally tested him, you had no knowledge, did you, if the x-rays taken at the St. James Hospital?

A That is correct. I didn't have the St. James record.

Q You didn't know the conclusions by this hospital which included posttraumatic cranial syndrome, laceration of the scalp which required three sutures, severe anxiety reaction and cervical myositis, is that true?

A I wouldn't quarrel with the diagnosis.

Certical myositis is a self-limited inflammation from trauma.

Cranial syndrome is used to describe any head injury, and anxiety seems to been the situation here because he passed out allegedly when he left the emergency room and had to be brought back.

Q Three days later or two days later.

Doctor, please assume as true that prior to September 1, 1968 this plaintiff was gainfully employed, earned approximately $200 a week for a number of years as a longshoreman working in the hold of a ship, no history of any accident or disability; that in the course of his work, while they were discharging cans of pineapple on a propalletized device, the pallet broke, cracked open, and the cans of pineapple that were being discharged at that time fell upon his person indiscriminately and rendered him unconscious until he came to up on the main deck, where he went to the St. James Hospital and obtained emergency treatment which included three sutures.

On the 4th of September, which is two or three days later, he passed out and was taken in by this hospital and kept for about 21 days. They performed an electroencephalogram and found it abnormal; that

they also treated him for his complaints related to his shoulders and his back and his head.

A I didn't see any mention of back treatment or complaints in that record. I have to admit that I am a little bit farsighted and I didn't bring my glasses so I couldn't read every word. It is poor photostating.

Q This is a poor photostat record anyway, doctor.

A Yes.

THE COURT: Is it disputed that that is mentioned in the record, gentlemen?

THE WITNESS: The discharge diagnosis i don't believe mentions his back at all.

Q I will withdraw the lower back from the question.

He also submitted himself to a pantopaque myelogram which did not take because the procedure drew the blood instead of taking the spinal fluid out.

Doctor, do you agree with your father with respect to the only time you take a pantopaque myelogram is just before operative procedures?

A I do.

Q And yet he submitted himself to this for a diagnostic procedure, did he not?

A Yes, sir.

Q Does that in your opinion go to his credibility of trying to find out what was wrong?

MR. REID: I object to that.

THE COURT: Yes.

Q He cooperated, as far as you know, with the hospital authorities,did he not?

A Yes, sir.

Q And there are complaints which cannot be seen on x-ray, aren't there?

A Complaints can occur. I can complain right now and you won't see it, yes, sir.

Q Nerve involvement would not be seen on x-ray, would it?

A No, sir.

Q Cerebral damage would not be seen on x-ray as far as the brain tissue is concerned, is that true?

A You can pick it up if you do enough tests and if there is some realistic damage there.

Q You would have to put a dye into the arteries of the brain to do that, wouldn't you?

A That or pneumoencephalogram. There are a number of specialized techniques using x-ray that you can do it with.

THE COURT: Mr. Klonsky, you were in the midst of putting a hypothetical question to the doctor and you were interrupted on the matter of the lower back. Do you want to proceed with that?

MR. KLONSKY: Yes, ma'am.

Q Dr. Balensweig, please assume the truth of what I told you and also his complaints of pain, limitation of movement of the neck, anxiety, as you see in the record, and a concussion of the brain, which comes from a positive electroencephalogram.

Do you have an opinion based upon a reasonable degree of medical certainty as to whether the falling case or cases of pineapple that fell on his person would be a competent producing cause of these findings and complaints?

A It would be at that time, yes, sir.

MR. KLONSKY: Thank you.

REDIRECT EXAMINATION

BY MR. REID:

Q When you examined him, you didn't find that, did you, doctor?

A No, I did not.

Q Doctor, did Mr. Fernandez bring any medical reports to you and give them to you and say, "Here, doctor, here is my history"?

MR. KLONSKY: Objection to that. Yhat is not the procedure with respect to the defendant's doctor. The defendant's doctor gets his information from the defendant's attorney.

MR. REID: He does not.

MR. KLONSKY: I won't argue with you, Mr. Reid.

A The answer is no.

THE COURT: Any further cross examination of this witness?

MR. KENNY: No, your Honor.

MR. LARSEN: No, your Honor.

MR. BRADY: I have no questions, your Honor.

THE COURT: Thank you. You may come down, doctor.

(Witness excused.)

THE COURT: Do you have another witness, Mr. Reid.

MR. REID: Yes, I have a witness, your

* * *

MR. REID: The other purpose is to show that Castle & Cook had complete information of the shipment from its inception to the loading and thereafter.

MR. KLONSKY: Is this with respect to your third-party claim over against Dole?

MR. REID: Yes.

MR. KLONSKY: It has nothing to do with our claim.

MR. REID: I don't think so.

MR. KLONSKY: I have no objection.

THE COURT: Let it be received.

(Defendant Chios Exhibit N was received in evidence.)

xx DIRECT EXAMINATION

BY MR. REID:

Q Mr. Devaney, where do you reside?

A In Manhasset, Long Island.

Q What is your occupation?

A I am presently a consultant with John W. McGrath Corporation.

Q What is the nature of the business of John W. McGrath?

A Stevedores.

Q Where do they stevedore?

A In New York, Philadelphia, Baltimore, Norfolk, Charleston, New Orleans and some other cities in the Gulf.

Q What phase of that business are you a consultant in?

A Marine carpentry, sir.

Q Could you keep your voice up a little bit?

A Marine carpentry.

Q Thank you.

Prior to being a consultant with McGrath & Company, had you engaged in the marine carpentry business?

A In 1942.

Q For what period of years thereafter?

A Presently.

Q At one time did you own your own business?

A I did.

Q For how long?

A From 1942 to 1966.

Q Have you ever been a longshoreman?

A Yes, sir.

Q What did you work?

A I worked for United Fruit Company.

Q Is that the New York waterfront?

A Yes, sir.

Q Where did you learn the ship carpentry business?

A At the United Fruit Company.

Q How long were you with them?

A I was there from 1932 to 1935.

Q Your line of work as a ship's carpenter, did you have occasion to build what is called a stevedore's pallet?

A Very, very many of them, sir.

Q How many would you estimate over a period of time?

A Hundreds of thousands.

Q Could you tell us, were they used for the New York waterfront as well as Newark and Jersey City waterfront?

A I don't get the question, counselor.

Q These pallets which you constructed, were they used on the New Jersey, New York waterfront?

A Oh, yes.

Q Could you tell us what a stevedore's pallet is? How it is constructed and it's weight.

MR. BRADY: Your Honor, I object. This

case does not involve such a pallet. Unless this witness has actually examined the pallets in this case at the time this accident occurred, I will object to further testimony by this witness.

THE COURT: Overruled.

MR. BRADY: Respectfully except.

MR. REID: Will you read the question back to the witness, please.

(Question read.)

A A stevedore's pallet is four foot by six foot. It is 48 x 72 inches. It is constructed of eight deck boards on either side. Each board is two boards or four boards, two boards on top that are 1 x 8, 1-1/8 x 8 oak. There are six boards that are 1-1/8 x 6. The sleepers are 3 x 4.

Q What is a sleeper?

A The sleeper is the three pieces that the deck boards are nailed to, and each one of the sleepers have a depth of four feet and your deck boards have a depth or width or length of six feet.

The same thing is on both sides. They are usually reversible pallets.

Q What is the size of the sleepers?

A 48 x 72 inches. The size of the sleepers?

A Are 3 x 4; 3 inches by 4 inches by 4 feet.

Q What do these pallets weigh? What is the weight of the pallets?

A About somewheres between 180 and 210 pounds.

MR. BRADY: I will object to somewhere between 180 and 210 pounds, your Honor. That is quite a variance for one pallet.

THE COURT: Overruled.

MR.BRADY: Respectfully except.

A I may answer that for the counselor by saying that there is a certain amount of water in every piece of lumber. Some of it has a content of 15 per cent, some has a content of 20 per cent. It is not all dry lumber. It is not kiln-dried lumber. This is lumber that comes off the tree so you would have a variance in the weight, counselor, the water content of the material that is being used at the time that it is manufactured.

Q What cut of the tree is used?

MR. BRADY: Objection unless this witness has actually cut a tree and knows what cut it is.

THE COURT: Overruled.

MR. BRADY: Respectfully except, your Honor.

A If you took a tree and you cut off the bark --

MR.BRADY: May I have a voir dire on this, please?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. BRADY:

Q Mr. Devaney, did you ever cut a tree and cut the bark off?

A No, I did not.

Q When you buy lumber, you buy prepared lumber, isn't that right?

A Now wait a minute. When I buy lumber, I buy it according to grade.

Q When you buy it, it is already prepared for you, isn't it?

A According to grade.

Q Sure, but you don't take the bark off now, do you?

A Nobody buys back.

Q I am asking you what you do, sir?

A I buy it according to grade. I have answered your question.

Q You don't know what --

THE COURT: The question is whether he has ever examined any of these pallets, stevedore's pallets.

Have you actually examined one or purchased one?

THE WITNESS: I made them.

THE COURT: You make them.

MR. BRADY: Your Honor, there is no basis for this witness --

THE COURT: He is qualified as an expert to testify.

MR. BRADY: He is not qualified yet, your Honor.

THE COURT: I have just ruled that he is qualified as an expert.

MR. BRADY: May I have a voir dire, your Honor?

THE COURT: No, because I have ruled that he is qualified to testify as to construction of a stevedore's pallet. He has testified that he makes them. Overruled.

MR. BRADY: I respectfully request that I be given an opportunity for a voir dire on the qualifications of this witness.

THE COURT: I have just denied it.

MR. BRADY: Respectfully except.

THE COURT: All right, proceed, Mr. Reid.

DIRECT EXAMINATION CONTINUED

BY MR. REID:

Q On these stevedore pallets, are they constructed in such a way that you can put cargo-lifting gear on them to lift them up?

A There are two types of stevedore pallets. There was a flush -type pallet where you may use a key to insject into the side of it and lock it that way, or there was a wing-type pallet where you may use your bars to lift, or you have two-way entry where you use your fork lift.

Both of your flush and a wing-type pallets give you two-way entry. Two-way entry means one from the north side and one from the south side, but nothing from the east or the west.

Q And the sleepers are on that side?

A The sleepers are running north and south.

Q There is evidence in this case that the pallet -- I am referring now to Dole's answers to interrogatories -- the lumber was cut into sizes 40 x 48, prenotched 2 x 3-5/8 stringers with 2-1/2 C.W. nails And there is further evidence that there were boards which were placed across the stringers into which the nails were put to hold them to the stringers.

Are you familiar with that type of a pallet?

A Well, I would say that there is only one way to make a pallet.

MR. BRADY: Excuse me, your Honor, that is not responsive to the question.

Q Put it this way: have you seen such pallets being used in the handling or transportation of food products?

A I have.

Q Could you contrast that type of pallet with the stevedore pallet?

A Well, the stevedore pallet is made primarily for the benefit of the stevedore and their clients. That can be used for many times without the normal wear and tear that it gets.

The product that you are referring to is more or less what is known as a disposable pallet. It may be used once by the consignee or it may be used twice by the consignee. but it is primarily a very cheap product.

MR. BRADY: I must object unless this witness has actually examined one of these Dole pallets. What is he talking about.

THE COURT: Have you examined any of these

truthful pallets that you referred to?

You call them fruit pallets?

THE WITNESS: No. May I?

THE COURT: The question is have you examined any.

THE WITNESS: No, I have not, no.

MR. BRADY: Your Honor, I object to any further testimony concerning the Dole pallets since this witness has just testified he hasn't examined them.

MR. REID: I have asked him to assume, your Honor, answers to interrogatories of the Dole people that it was a certain size. I have asked him to contrast that with the stevedore's pallet.

THE COURT: You are putting to him a hypothetical question.

RM. REID: Yes, your Honor.

THE COURT: All right.

MR. BRADY: Your Honor, may we have the specific hypothetical question, please.

THE COURT: All right, the reporter can read it.

(Record read.)

Q You are familiar with that type of pallet?

A Yes, I am, sir.

Q Would you contrast that type of pallet with a stevedore's pallet?

A I have already done it.

MR. BRADY: Objection. He says he has never observed a Dole pallet. He has no basis for contrast.

THE COURT: The question to the witness is, having heard those dimensions with respect to the thickness of the wood, are you familiar with that kind of pallet. I gather he is saying he is, that you have seen others like that other than the Dole pallet, is that it? I gather he is saying he is, that you have seen others like that other than the Dole pallet, is that it?

THE WITNESS: Your Honor, may I put it to you this way in answer to your question: that the 40 x 48 size pallet is primarily used in the food business of which Dole is part. I am not trying to make any difference between Dole or any other food commodity.

THE COURT: Have you seen such pallets?

THE WITNESS: Yes, I have seen such pallets.

MR. BRADY: Your Honor, I object on the grounds that he has seen other such pallets which would

not be a basis for his testimony in this case concerning a Dole pallet . His specific testimony is that he has never observed the Dole pallet. He has merely looked at other food containers. That is not a basis for his testimony in this case.

THE WITNESS: It is not a container, it is a pallet.

MR. BRADY: Please, don't interrupt me.

THE WITNESS: It is not a container.

THE COURT: Just a moment.

MR. BRADY: Your Honor, will you please direct the witness not to interrupt me?

THE COURT: Yes.

MR. BRADY: That would not be a sufficient basis, your Honor, for him testifying in this case about a Dole pallet merely because he has seen some other food containers.

THE COURT: Let's assume that he has not seen some other food container. The witness has been qualified as an expert in the making of stevedore's pallets. He is now being asked to assume a pallet having these dimensions as set forth in the interrogatories and as an expert he is therefore qualified to give his opinion as to the use and durability or strength of such a pallet

as described in the interrogatories.

On that basis he can answer the question. Given those dimensions with respect to the wood and so forth, do you have an opinion --

MR. BRADY: Excuse me, your Honor. Do I understand the court to say that this witness is limited to the dimensions of the particular pallet and that is the basis for his opinion. Is that correct, your Honor?

THE COURT: I assume that those dimensions include the thickness of the wood, do they?

MR. BRADY: No, your Honor, they don't.

THE COURT: Just the size?

MR. BRADY: They don't give any thickness, your Honor. These dimensions give length and width and they do not give any thickness.

If your Honor please, I have an objection. These dimensions are based on length and width only and do not give any width dimensions.

THE COURT: What do you say to that, Mr. Reid?

MR. REID: Put it this way, your Honor: I asked detailed interrogatories, the Dole people to give me this information, and this is all I get back and --

MR. BRADY: Your Honor, that is not a response to the question. The question as posed is based upon a hypothetical in an interrogatory. Now, that is not a response to this question.

THE COURT: Mr. Brady, the witness has testified that a stevedore's pallet has a certain length and width and depth, is that right?

THE WITNESS: I did.

THE COURT: Do you want to repeat those? What is the length?

THE WITNESS: 4 x 8. Four foot by six foot.

THE COURT: What is the depth? Is there a depth to it?

THE WITNESS: It is 72 inches long and 48 inches deep.

MR. BRADY: I don't think the witness understands the word "depth."

THE COURT: Does it have some depth?

THE WITNESS: There are eight boards on top and eight boards on the bottom and three stringers.

THE COURT: Three stringers?

THE WITNESS: They are pieces of 3 x 4 that we use that you nail the deck boards to.

THE COURT: Yes.

THE WITNESS: If this was a pallet, this was the basis of a pallet, starting from fresh, right, I would put three pieces of 3 x 4 here and then I would start to nail my deck boards to these three pieces.

THE COURT: These deck boards are now wide?

THE WITNESS: There are two pieces that are eight inches wide and four pieces six inches wide.

THE COURT: And how long?

THE WITNESS: Six foot.

THE COURT: The dimensions that were given here are what?

THE WITNESS: 40 x 48 inches.

BY MR. REID:

Q 40 x 48, 3 inch --

THE COURT: 40 inches?

MR. BRADY: 40 inches by 48 inches.

THE COURT: As opposed to 4 feet by 6 , was it?

THE WITNESS: That's right.

THE COURT: Now, the questin then to the witness is what, based on that information, Mr. Reid?

Q And that you have 3-inch by 2-5/8 stringers?

THE COURT: What is the question?

Q What is the difference of the dimension between those stringers and the stevedore stringers?

MR. BRADY: Your Honor, respectfully, surely anybody can subtract 48 from 60. I don't think this witness has to do that. If it is just a question of size --

THE COURT: You admit that it is smal er, is that it?

MR. BRADY: If the stevedore is 60 inches and the Dole is 48 inches, there is no dispute that one is 48 and one is 60.

THE COURT: Let's move on from there, Mr. Reit. What is the next question?

MR. BRADY: We don't need a witness for that.

Q Are you familiar with mahogany wood?

A What type of mahogany wood?

Q Lauan. I will show you a piece of wood here and I will ask you whether or not you can identify that.

A It looks like a piece of mahogany from the Far East, maybe from the Philippines or some place like that.

MR. BRADY: May I have a voir dire on this, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. BRADY:

Q Mr.Devaney, when were you last to the Philippines?

A I was never in the Philippines, sir.

Q How do you know any such wood would come from the Philippines just by looking at a piece of wood?

A I have purchased lumber from the Philippines.

Q When was that, sir?

A During the war.

Q What war was that?

A It wasn't the First World War. It wasn't the Civil War either.

Q Why don't you just tell the jury what it was, sir?

A I said it is similar --

Q You mean World War II?

A Yes.

Q You purchased wood from the Phillipines?

A Yes,sir.

Q From the Japanese?

A Not from the Japanese, no.

Q Don't you know that in World War II that the Philippine Islands --

THE COURT: We are not getting into that. Either he purchased it or he did not.

A We purchased it after the war too.

Q Wait a minute.

A After the war too.

Q You say you purchased it during World War II?

A We did.

Q From whom? What Japanese again sold it to you?

A From the Japanese.

Q You bought it from the Japanese in World War II.

A And sold it to the United States Government, yes.

Q That is what you want this jury to believe?

THE COURT: Mr. Brady?

A If you want those kind of answers, I will give them to you.

THE COURT: The witness has testified that he purchased wood of that kind from the Philippines during World War II.

MR. BRADY: Yes, your Honor.

THE COURT: Let's proceed.

MR. BRADY: I would just like the court to take judicial notice that the Philippine Islands were under control of the Japanese Army in World War II and we were at war with Japan in World War II.

Q Other than during World War II, sir --.

A Maybe -- I will go back to 1952, after that. Excuse me.

Q Let me ask the questions, please.

A Let's go back to the Korean situation. I may have made a mistake.

Q You may have made a mistake.

A But we did purchase it and from Brazil too, a similar type of lumber from Brazil too.

Q Similar. You mean they have --

THE COURT: Mr. Reid, where did you get that piece of wood --

MR. REID: This was given to me last Friday at Maher Warehouse in Port Newark by an employee of Maher's and it came off of -- I was told it came off of a pallet, that was used by the Dole people.

MR. BRADY: I will object to what Mr. Reid was told by some Maher employee. I will certainly

object to this witness testifying --

THE COURT: I thought perhaps it was from the package in question here.

MR. REID: I wish it was.

MR. BRADY: Your Honor, I would object. If this is something taken by Mr. Reid last Friday from some employee of Maher and not taken from the very pallet in question, I would certainly object to this witness identifying it in any way or even using it.

THE COURT: That is what I was getting at. Mr. Reid, was that from the package in question?

MR. REID: No, your Honor, I wish it was. It is not. I would like to know where the pallet is, but my question relating to this witness, your Honor, is, is he familiar with this type of wood. I wanted to ask him is this the kind of wood that they use in stevedore's pallets and other type of pallets.

THE COURT: You can ask him that quest. Ask him if that is the kind of wood used in stevedore's pallets, first of all.

BY MR. REID: Is this

Q Is this the kind of wood that is used in stevedore's pallets?

A No, sir.

Q Why is that?

A Because we construct --

MR. BRADY: Objection, your Honor.

THE COURT: Objection to what?

MR. BRADY: To the question of why, your Honor.

THE COURT: Overruled.

MR. BRADY: Respectfully except.

A The reason we don't use that type of material is because it is a soft or mediocre soft, but not considered a hardwood.

Q What is its relative strength with respect to oak --

MR. BRADY: May I have a voir dire on this.

THE COURT: I didn't hear the question.

Q What is its relative strength with respect to oak?

MR. BRADY: Objection. There has been no identification of this particular wood as belonging to any particular wood family or any particular location or having anything to do with this particular case.

THE COURT: Yes, that seems to be the case, Mr. Reid. Does that piece of wood meet any of the

dimensions in the interrogatories?

MR. REID: It does not, your Honor. It is a broken piece of wood.

THE COURT: As to thickness?

MR. REID: I believe so, your Honor. It is believed it is 3/4 inch.

MR. KLONSKY: Mr. Reid, could I suggest you look at interrogatory 13.

MR. BRADY: We have been looking at 13.

THE COURT: I thought he said.

MR. BRADY: We have been looking at 13, your Honor. Excuse me.

MR. REID: 13 is the same --

MR. BRADY: We have been using 13.

THE COURT: Let's proceed, Mr. Reid.

MR. REID: Very well, your Honor. May I just mark this for illustration, for a limited purpose only that illustrates that this was a piece of lauan mahagany.

MR. BRADY: Objection. There has never been any such identification as luana or any other kind of identification.

THE COURT: Yes, that is true.

BY MR. REID:

Q Can you identify this as lauan mahogany?

A No, I cannot, sir.

MR. REID: All right. That is the end of that.

Q In connection with the records which were attached to Dole's answer to interrogatory No. 4, Defendant Chios Exhibit N, sales invoice No. 1612P, listed as No. 17 in the passage of papers, I call this to your attention, sir, that there were some cases which were 24 x 1/2 inch, Dole fancy sliced pineapple, 15-1/4 ounces. Size is 22/2 Dole fancy sliced pineapple in juice, one pound four ounces.

Size 6/10 Plantation Cho sliced pineapple, six pounds, twelve ounces.

Size 24/2, Dole fancy pineapple chunks in juice, one pound and four ounces.

Size 24/2, label Long Island Cho pineapple tidbits, one pound and four ounces.

Size 24/1-1/2, Dole fancy pineapple chunks, 15 pounds and one ounce.

Size 24/1-1/2, Dole fancy pineapple tidbits, 15-1/4 ounces.

Size 24/2, Dole fancy crushed pineapple in

juice, 1 pound and four ounces.

Size 4/10, stamped fancy pineapple juice concentrate, 61 Brix, eight pounds and four ounces.

Now, if we translate that, Mr. Devaney, into cartons or cans and the weights of the cans, you will get about 30 pounds to a carton, would you not?

MR. BRADY: I would object to that, your Honor. I don't know how we could translate that long list that was just read to us into 30 pounds per carton unless we know how many cans of what particular size were put into each carton and then we can say what cartons were in the pallet which is the cause of this accident.

THE COURT: What do you say, Mr. Reid?

MR. REID: I will give him the same answer he gave me. It is a matter of simple arithmetic.

MR. BRADY: Your Honor, there is no basis in the record to say what cans, nor how many were in the cartons, if we ended that, or to say the number of cartons which were put on any particular pallet, let alone the pallet which was involved in this particular accident. There is nothing in this record at all which would make that point clear.

THE COURT: What you just read, was that

relating to the pallet in question, Mr. Reid?

MR. REID: I would like to read the first part of answer to interrogatory No. 4:

"The product was loaded aboard the Chios by local stevedoring outfit Minobros under contract with Dole Philippines.

THE COURT: Would you now read the question to the witness, Mr. Reporter.

(Question read.)

THE COURT: I don't think the witness can answer that unless he had some kind of computer in his head.

MR. REID: I think he can answer that, your Honor.

MR. BRADY: I will place an objection on the record.

THE COURT: The objection to that question is sustained.

MR. REID: Your Honor, I am trying to establish here through the records of Dole themselves what the weights of these cartons were and this is one way to do it, by using their own invoices which gives us the size of the cans and the label with the weights of the cans and these sizes refer to cases. Maybe I should have

read that too, the cases. The cases, the size and the label. I didn't read that because I didn't think it was necessary, but the information as to the size refers to the size of the can. I can go in the grocery store and you pick up a No. 2 or No. 2-1/2 or No. 1 can and it has a weight on it. The weight is on the label and you know that that can weighs so much.

A No. 2 can weighs a pound and a quarter.

You have 24 cans to a case; then you know exactly how much that case weighs.

MR. BRADY: I would object, your Honor.

No. 1, how could we tell on this particular pallet involved in this accident what size cans or the number of cartons on the particular pallet. Even assuming all this could be shown, which I submit it can't be shown, how can we tell what type of cans or the number of cartons were on the particular pallet involved in this particular pallet just from a recitation of an invoice reading.

THE COURT: As I understood the testimony, each of these prepalletized units contained a certain number of pineapple. Is that so?

MR. BRADY: No, your Honor, there is no such testimony. Everybody was sort of guessing. Nobody

has actually said how many cans were on this particular pallet and nobody ever took notice of it. These men were stevedores.

THE COURT: Pardon me.

MR. BRADY: The men involved, the testimony that we have, are all stevedores. They weren't paying attent to the number of cartons on this particular pallet.

THE COURT: Is there anything in the record?

MR. REID: Yes, there is.

Say this is the pallet. There is testimony from Mr. Romero that he said that these were stacked flush on the pallet,the cartons, and he said they were about eight high.

THE COURT: Eight what high?

MR. REID: Eight cartons high. And translating that to feet would be five feet.

Now, I think with those dimensions, together with the records of the Dole people, it won't take us very long to figure out how many cases they had on this little square or rectangle and the weight of them, because they are on a certain size. You can get so many within the bounds of the four corners of a rectangle and no

more. If thee are stacked flush on top of that, that is the metes and bounds.

MR. BRADY: Even by Mr. Reid's own argument, he says that each can is a different size, which means that each carton would be a different size, filling that particular size can, so how can he he even say, assuming all he has said, which cans of what were -- even if there were four, three or whatever it was, how can he say what can was in that particular carton. Every can is a different size according to Mr. Reid's own argument.

THE COURT: The objection to the question which you had put to the witness was well taken because it was unintelligible. I couldn't understand the question, and if you have some other way of making this more intelligible to the jury, we will permit you to ask the question. But as put, the objection is sustained.

Q Let me put it this way to you and we will simplify it: that you had a pallet 40 inches by 48 inches and you had cartons which were stowed on that pallet flush with the surface of the pallet, and these cartons were stowed eight high across the surface and they stood up from the deck about five feet.

Now, could you, without knowing the exact weight of these cartons give an opinion on the assumption of the the further facts which I will state to you:

That this particular carton as I ahve described to you and the way it was stacked was on the top stow in the wing of the ship and a Hi-Lo went in and put its blades in in between the sleepers or the stringers and the Hi-Lo operator, he lifted it up, he began to move back and when he had moved that pallet back about half way or a little more off the stow, there was a cracking sound.

MR. BRADY: Your Honor, that is not a fair recollection. No. 1, he's got his versions mixed up.

MR. REID: Will you let me finish my statement, please.

MR. BRADY: Your Honor, I object.

THE COURT: Let him finish and then I will hear the objection to the question.

MR. BRADY: Yes, your Honor.

Q And the pallet broke in half and dumped the contents down on the deck.

On the assumption of those facts that I gave to you, do you have an opinion, with a reasonable degree

of certainty as to the cause of the pallet breaking in half?

MR. BRADY: Objection, your Honor.

THE COURT: I will hear the objection.

MR. BRADY: No. 1, the vital factor, of course, is the weight upon the pallet and the hypothesis fails to include the most necessary element, which is weight. The mere dimension of size and height would be insufficient even as a hypothesis to have someone conclude that size by height and length and width would of itself cause something to collapse.

Moreover, Mr. Reid has gotten his versions of how this accident happened confused. The man who testified on trial as to a contract was the man who said he saw it being lifted up by the crane and not the man who is supposed to have been using the fork lift. So there would be no basis on either side for this particular hypothesis.

MR. REID: I haven't finished it yet.

MR. BRADY: I am sorry, your Honor. I thought Mr. Reid had finished.

MR. REID: I hadn't finished it. I would like to finish it.

MR. BRADY: Tell me when you are finished.

Q Now, assume further, sir, that this pallet was manufactured by the Dole people and it was packaged with the cartons of pineapple manufactured by the Dole people and it was brought down to the ship's side and it was loaded aboard the ship and the mate went into the hold of the ship and he looked at this stow of these pallets and he issued a mate's receipt, good order and condition, and the States Marine issued a bill of lading and it says good order and condition, and there were no exceptions or damage taken on the bill of lading.

Then the ship came into New York or Port Newark --

MR. BRADY: Excuse me, your Honor.

Q -- and the pallet broke in half as I have described to you.

Now, on the basis of those facts which I am asking you to assume, do you have an opinion with a reasonable degree of certainty as to the cause of the breaking of the pallet?

MR. BRADY: Objection, your Honor.

THE COURT: I will hear your objection.

MR. BRADY: There is still nothing added to this particular hypothesis which would give this man a reasonable basis for making any assumption since he

has not been given the quantity of packages, the weight of each package, the number of those packages on this particular pallet involved in this particular accident. Asking this witness to give such an opinion now would be asking for sheer speculation. There is no weight at all given in this hypothesis by any form.

Moreover, the hypothesis is deficient since it has apparently left out the fact that there were several surveys all along the voyage by different surveyors on behalf of the charterer.

Q Assume further that there were these surveys along the voyage and the surveyors found nothing wrong with the stow.

THE COURT: Has the witness been given the size and dimension of the pallet with respect to the thickness of the wood and all of that in this question?

MR. REID: Your Honor, I really don't care whether there was a gnat on top of that pallet. The evidence in the case is that the pallet broke.

THE COURT: I thought you wanted him to give some opinion with relation to the weight of the goods on that pallet.

MR. REID: I was trying to do that, your

Honor, with the records of Dole, but I was interrupted. I have some more figures here that have been left out here.

The average weight on a pallet, I will put that in, but I am not really particularly concerned now about whether, as I say, a gnat was on the pallet or a handkerchief was on the pallet, the evidence is that it broke.

THE COURT: You want him to give some reason based on those facts why he believes the pallet broke?

MR. REID: Yes.

MR. BRADY: Your Honor, I would submit that there is insufficient hypothesis here to explain why it broke. There is no explanation of what, if anything, was on this particular pallet, what quantities --

THE COURT: Well, there is evidence as to the height of the cans or cartons on the ballet. Is that so.

MR. BRADY: There is no evidence. They are all guesses. All the witnesses say it was their guess. Nobody ever measured it.

THE COURT: Their best recollection that they gave.

MR. BRADY: All the witnesses say it was their guess. Each witness -- and I asked them, "Wasn't that your guess?" -- there are no measurements of what was on that particular pallet.

THE COURT: That is why I asked at that particular point and you objected whether that was their best recollection and they said yes.

Obviously they didn't measure it. They could only give us their best estimate of the height and that is what they gave. Their best estimate was that it was five feet, as I recall, eight cartons being stacked to the pallet. Is that right. That is their best estimate.

MR. BRADY: As a guess, but not as a measurement.

THE COURT: I am asking you what it was.

MR. BRADY: I think one witness guessed about five feet, yes, your Honor.

THE COURT: So we have evidence that it was five feet high and there were about eight cartons to a pallet.

MR. BRADY: No, your Honor.

THE COURT: We also have evidence as to the size.

We also, I thought, had evidence as to the thickness of the wood of which thispallet was constructed, but we don't.

MR. REID: The stringers, your Honor, we have the size of the stringers.

THE COURT: When you say the stringers, are those the long pieces of wood.

MR. REID: I believe that he said they were about an inch and a quarter, that is my recollection. I may be wrong, but he said there were boards nailed across the sleepers, and that is the only way you could get the cartons on the pallet, to have boards across the sleepers.

MR. BRADY: There are no measurements, your Honor. There is no way determinable as to what was on this particular pallet.

MR. REID: Your Honor, may I at this point call to the court's attention interrogatory No. 30.

"Will you, in lieu of a notice to produce, make available for inspection at a mutually convenient time a prepalletized package of cartons of pineapple like that shipped aboard the Chios on which is the subject of the plaintiff's claim?"

I get this answer:

"Defendants will make available a palletized load. However, defendants cannot guarantee that the load will be the same as shipped by Chios. The defendants shipped at alternate times from the Philippines to the Newark pier. Defendants can only check the dates of delivery and make a pallet available in accordance with shipments to that pier."

MR. BRADY: If I may, your Honor.

THE COURT: Just a minute.

MR. REID: I have yet to have them produced, your Honor, and this demand was made on these people last year.

MR. BRADY: Let the record show, your Honor, this accident happened in 1968. Let the record show that this shipowner did not bring action against us until 1974, several years later.

THE COURT: Just a moment. What I was getting at, Mr. Reid, is there evidence in the record relating to the construction of the pallet on the cans of pineapple. I thought there was some testimony not only as to the length and the width of certain boards but as to their thicknesses.

Am I wrong about that?

MR. REID: I don't believe you are, your

Honor.

THE COURT: Let's try to recollect who testified as to the width of the boards or the thickness, I meant to say.

MR. BRADY: Your Honor, if I may, the length and the width is not in dispute. There is no evidence that I know of of anybody saying what the thickness of the particular boards were.

THE COURT: Do you recall that, Mr. Klonsky?

MR. KLONSKY: I am looking for it. I do remember something about the thickness of the woods. I think it was contrasted 1-1/2 inches with 1 inch, but I am looking for it.

MR. REID: The only thing I have in my notes is Mr. Romero, who says pallets four inches by four, eight packages about five feet high. He said that these stringers or sleepers, that they were covered by boards,

I don't have it in my notes, but I cannot warrant that my notes are full notes that he gave any thicknesses as to the boards across the stringers. We do know that there were boards there.

THE COURT: He gave the length and width of each board.

MR. REID: Yes, the board had to be, your Honor, at least four feet,or 40 inches, rather, to go across the stringers because he said the stringers were four feet long, 40 inches.

THE COURT: 48 x 40?

MR. REID: 48 x 40, and that was his estimate. And the Dole people, in answer to interrogatories, they say that the lumber was cut in size 40 x 48, which is the same thing, 40 x 4 feet.

THE COURT: I don't know that there is sufficient in the record, then, for this witness to tell us what might have caused the pallet to break open.

MR. REID: I will ask the witness to assume again as a part of this question, your Honor, the information which is contained on the bill of lading which was taken from the papers which were attached to the answers to the interrogatories.

At the Port of New York they had pallets, 737 pallets,and it says gross weight in pounds, 2,612,274. That is the gross weight of 1,116,019 long tons. If you divide the number of pallets into the gross weight, you will get an average of 3682 pounds per pallet.

MR. KLONSKY: Did you say 3000?

MR. REID: 3682 pounds per pallet.

THE COURT: You can give him that weight then.

Q I incorporate that statement in my hypothetical question.

MR. BRADY: Your Honor, I would submit that any such hypothesis certainly would not apply to this particular pallet. What does an average weight have to do with what was actually on this particular pallet. Different pallets had different sized cans. Each can weighed a different weight. How can you ask this witness to use an average weight to decide what happened to this particular pallet.

I fail to see how there would be any relationship between an average weight and what actually was on the particular pallet in question.

THE COURT: The evidence was that these packages were more or less even, as I recall the testimony, that these cartons or prepalletized cartons, were stowed in good order, it appeared, and they were even. The testimony of the plaintiff was to that effect, and I believe one other witness. Is that so?

MR. REID: Yes, it is.

MR. BRADY: Your Honor, assuming that they

were even, what were they even with?

THE COURT: That is evidence --

MR. BRADY: Even of the same size, your Honor, but what size.

THE COURT: Are you going to talk while I am talking.

MR. BRADY: No, your Honor, excuse me.

THE COURT: I started to say that is evidence from which the jury could find that these packages were all of the same size. So that objection is overruled.

MR. BRADY: Your Honor, what size? There were innumerable sizes. What is the smallest size, the medium size. Was it the crushed size? Was it the fancy size?

THE COURT: We are talking about each of these prepalletized units. There is evidence from which the jury could find that they were all of the same size.

MR. BRADY: No, your Honor.

THE COURT: Based on that plus the weight which has just been injected into this question, the witness can answer.

MR. BRADY: Excuse me, your Honor. One

moment, please. May I read the bill of lading to your Honor of the different sizes involved?

THE COURT: As to each pallet or as to each can?

MR. BRADY: Your Honor has suggested that because they were the same height, your Honor has suggested that they must have had the same weight.

THE COURT: No, I suggest that there is evidence from which the jury could find that they were the same weight.

MR. BRADY: What weight, your Honor? That is the point.

THE COURT: He just figured it out.

MR. BRADY: How are you going to figure it out from 30 different sizes. You are asking this jury to speculate.

THE COURT: You are not listening to what I am saying. I am saying there is evidence from which the jury could find that each of these units was of the same size although the cans within a particular carton may have varied in size. The unit itself is of the same size and consequently the same weight.

Now, with that information, you can proceed to ask the witness the question. Overruled.

MR. BRADY: If I just may, your Honor, what weight?

THE COURT: We have just gone over that and I have just overruled your objection.

MR. BRADY: Respectfully except.

MR. REID: Would you read the last statement, just the last part.

(Record read.)

Q Assuming that, I will ask you again: do you have an opinion with a reasonable degree of certainty as to the cause of the breakage?

MR. BRADY: Your Honor, I have an objection because we still don't know the thickness of the wood upon which the pallet was built.

THE COURT: Overruled.

MR. BRADY: Respectfully except.

Q You may speak. Have you got all the facets of the case or do you want me to repeat the question?

A No, I don't want you to repeat the question. I would like to say that every shipper has a reason for making a pallet of a certain size and certain weight.

MR. BRADY: Excuse me, your Honor, this is not responsive to the question.

A If you want me to explain it, I think this is

the best way to do it.

Q Do you have an opinion, and tell us what the opinion is and then you can give your response?

A Rephrase the question to me.

THE COURT: He gave a lot of information, facts to you, a long series now which he is asking you to assume from the evidence in the case; do you recall that?

THE WITNESS: Yes.

THE COURT: Now, based on that, the first question is, do you have an opinion, based on a reasonable professional certainty, as to what might have caused this pallet to break? That can be answered yes or no. Do you have an opinion?

THE WITNESS: Your Honor, it can't be answered yes or no.

THE COURT: You can tell us the basis of your opinion --

MR. BRADY: Excuse me, your Honor.

THE COURT: First of all, do you have an opinion. Can you give us an opinion as to what might have caused this pallet to break?

THE WITNESS: I can.

THE COURT: You do have an opinion?

THE WITNESS: Yes, I do.

THE COURT: Tell us what the opinion is. That is the second question.

THE WITNESS: The opinion is this: that a fragile pallet of this type -- I am talking about the custom; I am not talking about the one in particular, I am just talking about the trend of the market --

MR. BRADY: Move to strike.

THE COURT: Just a minute now. You started on this earlier when you were cut off. I believe you testified earlier that you were familiar with pallets constructed by fruit companies in the shipment of fruit, is that what you are about to tell us?

THE WITNESS: Yes, I have, your Honor.

THE COURT: What companies have you seen specifically.

THE WITNESS: Well, I told you I worked for United Fruit Company. Or didn't I?

THE COURT: I don't recall. You did work for United Fruit?

THE WITNESS: Yes, I did.

THE COURT: Do they have such pallets?

THE WITNESS: They did.

THE COURT: Around what kind of fruit?

THE WITNESS: Oranges.

THE COURT: In a shipment of oranges?

THE WITNESS: Yes.

THE COURT: They would make prepallets for the shipment of oranges?

THE WITNESS: They would carry them on pallets.

THE COURT: Previously made into the crates, is that it?

THE WITNESS: No crates. The crates would lay on top of the pallets, yes.

THE COURT: What was that constructed of?

THE WITNESS: Similar type pallet.

THE COURT: Of what was it constructed?

THE WITNESS: Hardwood.

THE COURT: When you say hardwood, what do you mean?

THE WITNESS: As compared to softwood.

THE COURT: Was it like a stevedore's pallet or the fruit pallets?

THE WITNESS: The dimension of that pallet was about 48 x 52.

THE COURT: It was larger?

THE WITNESS: A little bit larger, yes.

Maybe 10 per cent larger, 20 per cent larger.

THE COURT: You understand that the testimony here is that this pallet was 48 x 40, is that it?

THE WITNESS: That is right. What I am trying to explain to you, your Honor, and to the court here is when I said that this couldn't be answered with a yes or no, it was meant in this particular fashion.

MR. BRADY: Objection.

THE COURT: I haven't heard what he has said yet.

THE WITNESS: In some instances the pallet of this type is handled once or twice or three times. This particular pallet could have been handled five or six times of which I have no knowledge. The more that this particular fragile type of pallet is handled, the more you can expect to have results like you are talking about today where a pallet will disintegrate or collapse.

MR. BRADY: May I ask just two questions or three, your Honor?

THE COURT: Suppose we wait until your cross examination, but, in any event, the question to you was did you have an opinion as to what might have caused

this pallet to break open on the basis of what has been given you. Your answer was yes.

THE WITNESS: Yes.

THE COURT: Now will you tell us what your opinion is?

THE WITNESS: That is the first phase of my answer.

The second phrase of the answer could be faulty materials.

MR. BRADY: I am sorry, I didn't hear that.

THE WITNESS: Faulty materials in the construction of the pallet.

MR. BRADY: Could be.

THE COURT: Is there anything further, Mr. Reid?

MR. REID: No, that is all, your Honor.

MR. BRADY: At this time I move to strike that answer and to have it stricken from the record and the jury disregard it.

THE COURT: You are through with this witness, Mr. Reid?

MR. REID: Yes, your Honor.

THE COURT: I will permit cross examination.

CROSS EXAMINATION

BY MR. BRADY:

Q Now, Mr. Devaney, you don't know how many times this particular pallet was used before, do you?

A I do not, sir.

Q You don't know whether it was used once, you don't know whether it was used twice, do you?

A I do not, sir.

Q You never saw this pallet, did you?

A No, sir.

Q On what basis do you have to tell this jury that it depends upon whether it was used once or twice or three times or four times? What basis do you have, sir?

A I think you are misconstruing my answer. I didn't say whether it was used. I said how many times it was handled with the same freight on top of it.

Q Do you know, sir?

A I do not, sir.

Q Then you don't have any basis for your answer, do you?

A I was only asked as an opinion of what would weaken a pallet.

Q When did you first get into this case?

A Maybe some time ago.

Q I know some time ago. Does that mean an hour ago or yesterday or last week or World War II?

A It was World War I.

Q When were you first called to handle this case now?

A Maybe two months ago.

THE COURT: You mean to testify in this case?

Q When were you first called as a consultant? I understand you are a consultant, is that correct?

A That is right.

Q When were you first called as a consultant by Mr. Reid?

A Maybe six weeks ago.

Q Maybe. How were you called, by letter or what?

A By telephone, sir.

Q What occurred in the substance of that telephone conversation?

A The man asked me some questions regarding a pallet.

Q Did he ask you to testify then?

A No, sir.

Q When did he ask you to testify?

A Two weeks ago.

Q Did you ever look at any papers at all?

A What papers?

Q I am asking you,sir. Did you look at any papers to you by Mr. Reid?

A The only papers I saw from Mr. Reid were some measurements that he took of some pallets most recently in Port Newark.

Q Most recently. You mean last Friday?

A Well, I said most recently.

Q Sure, that was last Friday. So you had to be shown --

A They are only measurements.

Q I know. You had to be shown them between last Friday and today, is that correct?

A He spoke to me on the phone and gave them to me over the phone. It is common knowledge. You can make a product 40 x 48. It is no mystery. It is no engineering project.

Q You are not basing your testimony on the size of this pallet now, are you? Is that the basis for your testimony?

A Come again? My testimony in here is to the size of the pallet and what could weaken this pallet.

Q What could weaken it?

A I just gave you my answers. Do you want to give them back to him?

Q You don't know how old the pallet was, is that correct?

A To answer your question there, counselor, I would say it was a disposable pallet. It is a one-time user for the shipper to the consignee.

Q Although you had never seen it?

A Of course not.

Q You can tell this jury that it is disposable although you have never seen it?

A It is made for that purpose.

Q How would you know that?

A Because of the price of the pallet. Because we manufacture pallets.

Q You manufacture. How do you know what Dole paid for it?

A I have no idea what they paid for it.

Q Then you have no basis for saying it is a one-time pallet?

A If I wanted to go out and bid on Dole's business I could possibly get it.

Q Did anybody tell you that? Did Mr. Reid

tell you the price of the pallet?

A No, sir.

Q You have no basis for saying whether it is a one-time pallet or an expensive pallet or a cheap pallet, do you?

A The nature of the manufacture of the pallet will tell you it is a disposable pallet. It is not reversible.

Q How do you know? You have never seen it?

A I got the dimensions.

Q You got dimensions but that doesn't mean the can't be reversible.

A It does not have the same number of boards on the bottom as it has on the top.

Q How would you know that when you didn't see the original pallet?

A I understand that they went over and saw the pallets that Dole is still using today, and it must be the same pallet.

Q You didn't go over with them?

A No. I am sure the counselor is not going to give me a wrong figure.

Q Well, of course Mr. Reid -- where are you located, in Manhattan?

A Yes,sir.

Q And you are near Mr. Reid's office, aren't you?

A No, I live in Manhasset.

Q I mean your office in town.

A I live in Manhasset.

Q Your business office.

A My business office is in my home.

Q You work out of your home now?

A Yes, sir.

Q Are you retired?

A Yes, sir.

Q Oh, I see. You are a retired consultant working out of your home now?

A Yes, sir.

Q How long have you been retired?

A Just six months to the day.

Q You mean to say that Mr. Reid called you on the phone a couple of months ago, but when he goes over to Maher Warehouse he doesn't bother to call you on the phone and ask you to come with him?

A He did ask me to go and I refused to go.

Q You refused to go last Friday?

A No, not last Friday.

Q When did you refuse to go with Mr. Reid to see the type of pallets?

A Now listen, this particular type of pallet is no mystery. Once you have seen one, you have seen 600,000 of them.

Q Excuse me?

A This is no mystery, this particular pallet.

Q Why did you refuse to go with Mr. Reid?

A Because I didn't want to go.

Q You didn't want to go?

A No.

MR. KLONSKY: This has been gone over, your Honor. We don't want to stay here until 5 o'clock today.

MR. BRADY: We will continue tomorrow.

MR. REID: I would like to finish with this witness, your Honor.

THE COURT: Yes, let's finish with this witness. Proceed, Mr. Brady, and please don't repeat the questions.

MR. REID: I would like to call your Honor's attention that your Honor signed an order to show cause why they should not produce a pallet for me to inspect.

MR. BRADY: Excuse me.

Q Tell me, sir, you are being paid a fee by Mr. Reid, aren't you?

A Not to my knowledge.

Q You mean you are here without fee?

A As far as I know.

Q As a gratuity to Mr. Reid?

A Not as a gratuity, no.

Q Are you being paid to come here or not?

A I am not getting paid to come here. Do you want to know that?

Q What was it, a fine day in Manhattan and you decided to come in here and testify?

A I don't have to answer that question.

MR. BRADY: I see.

Q Did Mr. Reid tell you you don't have to answer questions --

A He didn't tell me anything. I just appear here as a witness.

Q Mr. Reid didn't tell you anything now?

A He told me nothing. I told you what he told me.

Q You never talked to Mr. Reid about this?

A What are you trying to prove.

Q You want this jury to believe that you came

up here as a consultant and you are not being paid?

A I am paid, fully paid by my company, and I don't need any money from Mr. Reid or from you either, sir.

Q So you are not getting any money from me, let's get that record straight. I am not giving you. I didn't ask you to come up here.

THE COURT: Mr. Brady, let's get on with this examination. The witness testified he hasn't been paid.

Q Do you belong to any societies, sir?

A Do I have to answer that question.

THE COURT: Societies, you mean professional societies?

MR. BRADY: Yes, your Honor, professional societies.

THE COURT: What kinds of professional societies?

MR. BRADY: Like societies involving the construction of wood pallets.

Q Do you belong to any of those organizations?

MR. KLONSKY: Is there one?

A There is none.

MR. BRADY: Yes, there is.

THE COURT: What did you testify your occupation was before you retired?

THE WITNESS: I was a marine carpenter.

THE COURT: Is there a marine carpenters association?

THE WITNESS: Well, we are part of the New York Shipping Association in conjunction with the ILA.

Q Did you ever hear of the National Wood Pallet Manufacturers Association?

A Yes, sir.

Q Do you belong to that?

A No, sir.

Q Don't they post standards and specifications?

A For your particular type pallet they do.

Q For all pallets, isn't that right?

A No, not all pallets.

Q Not all pallets?

A Primarily for the food product business, 40 x 48; primarily for them. Primarily. 80 per cent of their business is in that area.

Q This association has a business?

A It is not an association. It's in Washington,

D.C. Stevedoring industry would have no particular reason to go into that.

Q I see, you are in the stevedoring industry now, is that what it is?

A Did you ever hear of John W. McGrath Corporation?

Q That is a stevedoring company?

A That is right.

Q You work for a stevedore?

A That's right.

Q And you were a stevedore?

A I was not a stevedore.

Q Tell me this: what is your expert opinion on this accident, sir. What do you say actually caused it?

A I have no opinion of what actually caused it, sir.

MR. BRADY: Thank you. I have no further questions.

THE COURT: Is there any further cross examination of this witness?

MR. LARSEN: No, your Honor.

THE COURT: Any redirect?

MR. REID: No redirect.

THE COURT: All right, thank you. You may come down. The witness is excused.

(Witness excused.)

THE COURT: The jury is excused until 9:30 tomorrow morning.

(The jury left the courtroom.)

MR. BRADY: May I make a motion, if your Honor please?

THE COURT: Just a moment.

MR. BRADY: Your Honor, I move to strike out the entire testimony of Mr. Devaney on the grounds that he has just testified that he has no opinion as to what caused this accident.

THE COURT: What actually caused it, he said.

MR. REID: He doesn't have to. It is to a reasonable degree. It is not actual. Reasonable degree of certainty.

THE COURT: Yes.

MR. BRADY: Your Honor, he says he has no opinion.

THE COURT: The question was improper. He couldn't possibly know what actually caused it. He wasn't there.

MR. BRADY: That was his purpose here, your Honor, to give an opinion.

THE COURT: His opinion was based on the facts given him and he said he had an opinion and then he proceeded to try to explain the basis of his opinion, that it was probably faulty construction.

As a marine carpenter he is competent to testify as to how stevedore's pallets are made and he gave hsi opinion as to the kind of pallet involved here. As he said, he is familiar with the kinds of pallets used in the food industry to ship cartons of food. So he is qualified. He testified he could give an opinion as to what might have caused it without knowing all of this detail that you suggest since he is familiar with the general type of construction of pallets with respect to shipping food items.

Now, how many more witnesses do you have, Mr. Reid?

MR. REID: I have no more witnesses, your Honor.

THE COURT: No more testimony to be read?

MR. REID: The only thing I wanted to read is a few interrogatories and answers to interrogatories.

THE COURT: Then you will rest.

* * *

eoh19

THE COURT: We are trying to find out whether that is the case here. Whether there is evidence from which the jury could find that he was contributorily negligent.

MR. KENNY: Your Honor, I am Mr. Kenny, I speak for the stevedore. This is a question which is certainly of great interest to the stevedore.

THE COURT: We are going to get to you after we finish the case.

At this moment the juror is here and we are going to finish and then continue with this argument. I was just using the time until the juror came. We are not through with it.

Bring in the jury.

(Jury present)

THE COURT: Good morning, ladies and gentlemen. We are going to continue now with the defense in this case.

Mr. Reid, are you ready to proceed?

MR. REID: Yes, your Honor.

If the Court pleases, I would like to read from the interrogatories of Chios against Castle & Cook and Dole.

Interrogatory number 19.

"Q Were any load tests made to determine the strength of the pallet prior to use. If so, state, A, when, where and by whom (address) and for whom (address) where the tests were

eoh 20

made.

B. What the tests were.

C. What was the weight of a load used in the test.

D. What did the test show?

E. Were the tests reduced to writing.

And F, if so, in lieu of a notice to produce, attach a copy of the tests.

10. Pallets were merely made per instructions and held until needed for use. Lawaan is a wood of a strength which far exceeds that of other woods used in building pallets and strength to hold heavy weights. (palletized goods)."

We have in evidence, your Honor, a package of papers which were attached to the interrogatory answer number 4 of the interrogatories addressed by Chios to Castle & Cook and I would like to point out, your Honor, at this time just a couple of items one or two of which I would like to read to the jury.

There are a list of 27 items, identified items 1 to 27, there are a few other papers attached to those, but they are not numbered. They are at the end of these papers.

Number 3 is a shipping order.

eoh 21

Number 4 is a shipping order.

Number 6 is an export entry.

Number 7 a certificate of origin.

Number 8 is the export entry.

Number 9, certificate of origin.

Number 10 is loading information which shows the code numbers, the marks, the cases, the times, the pallets, the utilization of the pallets, which shows the requisition number, the code number, the marks, the number of cases, the kinds of the product, the pallets, the number of the pallets, the utiiization of the pallet numbers and the weights and the destination of the cargo.

Number 11 is the mate's receipt.

Number 12 is the mate's receipt.

Number 13 is authority of the master for States Marine to sign bills of lading.

Number 14 is the loading certificate signed by the chief officer, master, countersigned by R. Medina, agent super cargo assigned on board.

I would like to read what this loading certificate has to say.

The heading is Dole Philippines, Inc. and again Santos Cotabato. Loading certificate: This is to certify that on July 6, 1963, MS Chios voyage number 1 loaded at

eoh 22

Calumpang wharf Geng Santos, Cotabato, 72,506 cases Dole canned Pineapple in hatches numbers 2, 3 and 4 for discharge at ports in Newark, New Jersey, to Norfilk, Virginia. This cargo was loaded in good order and condition with adequate shoring and properly secured for the sea voyage.

It is countersigned by the master, chief officer and the super cargo whose name is R. Medina, agent.

Number 15 is outward foreign manifest dated July 6th.

Number 16 is a special custom invoice.

Number 17 is a Dole Philippine, Inc. invoice.

Number 18 is a special custom invoice.

Number 19 is Dole Philippine invoice and 20 is inter-office memorandum.

21 and 22 are the pallet distribution and 23 is a distribution sheet and 24 is a record of pallets shipped out.

25 is a bill of lading.

26 is a bill of lading.

27 is a transmittal letter from the Dole people.

MR. KLONSKY: Before he changes to another page, your Honor, may I rise and ask a point of information. Did he say it was 1963 voyage number 1. Did I mishear him?

Did you mean 1963?

eoh23

MR. REID: I am reading what it said on here.

MR. KLONSKY: How could 1963 be relevant in this case?

MR. REID: I think it is a typographical error, but I have to read what it says.

I think we can clear up this question of the voyage. States Marine has the voyage number and the Dole people have their own voyage number.

Item number 17, that is document number 17 is the sales invoice number 1612P, dated July 4, 1968. The heading Dole Philippines, Inc., sold to Dole Company, 5th and Virginia Street, San Jose, California, USA, destination Newark, New Jersey.

This was the document, your Honor, that I read to my expert witness yesterday concerning the dimensions of the cans and the weights of the cans.

If the Court please, I would like to read from the pleadings, the complaint of Chios against Castle & Cook and Dole and number 5 of the complaint --

MR. BRADY: I will object to counsel reading his own complaint, your Honor.

THE COURT: Yes.

MR. REID: These are admissions in the complaint.

THE COURT: Matters admitted in the answer of Cook?

eoh24

MR. REID: Yes.

THE COURT: To the complaint.

MR. REID: These are admissions.

THE COURT: All right.

Paragraph number 8 of the complaint, which was not denied, at all times herein mentioned fourth party defendants were and now are engaged in the manufacture and/or sale or distribution of pineapple package in cans and cartons and prepalletized for shipment, transportation, handling and discharge aboard ocean going vessels.

I would like to read, your Honor, part of paragraph 14 of the answer of the fourth party defendant Castle and Dole to the complaint of Chios.

"Admit at and before the times of loading fourth party defendant undertook to provide fourth party plaintiffs with a safe seaworthy and properly palletized package of cartons of pineapple."

At this time, your Honor, I would like to read from the interrogatories addressed to States and States' answers to the interrogatories.

MR. BRADY: Excuse me, your Honor, may I ask that the blind be closed, please.

THE COURT: Yes.

MR. REID: Interrogatory number 9.

eoh 25

"Q Was there an investigation made of plaintiff's accident?

"A No."

Interrogatory number 13.

"Q Was any report of the accident made?

"A No."

It says "No" but that means not by this defendant, States Marine, because these are the answers of States Marine.

21.

"Q Identify and describe the cartons of canned fruit and state how they were packaged as found in the stow aboard ship.

" A Upon information and belief the cartons of pineapple in number 3 lower hold were prepalletized into 370 pallets customarily and on information and belief and in the case at hand a number of cartons, said number depending upon the commodity and the size of the cans containing the pineapple product, were prepalletized by the shipper Castle & Cook, Inc., Dole Corporation and Castle & Cook Corporation and the manner and method employed by shipper and were loaded as pallets."

22.

"Q Was a cargo stowage plan furnished to you prior to the discharge of the Chios?

eoh 26

"A Yes."

23.

"Q If so, when, where and by whom the cargo stowage plan was furnished, will you annex a copy of the plan to your answers in lieu of a notice to produce.

"A Upon information and belief the final cargo stowage plan was furnished to the operating department of this third party defendant by its agent at the last loading port of Kobe, Japan. Copy of said stowage plan furnished previously."

24.

"Q Are the cartons of canned fruit described by plaintiff in the complaint the same as described in the cargo stowage plan as cargo of pallets of pineapple? Please note, if so, the cartons of fruit shall be referred to hereinafter as pallets of pineapple.

"A Upon information and belief yes."

35.

"Q Was the cargo of pallets of pineapple referred to in the cargo stowage plan as being stowed in number 3 lower hold of the SS Chios inspected by you before the commencement of discharge of the said cargo?

"A Not presently known."

37.

eoh27

"Q State what cargo was stowed adjacent to and above the pallets of pineapple and give the weights of said cargo adjacent to and above the pallets.

"A Number 3 lower hold above pineapple 106 long tons of cotton goods. Adjacent other pineapple."

46.

"Q Who were A, the shippers, B, consignees of the pineapple and, C, to whom was delivery to be made?

"A A. Dole Philippines, Inc.

B. Dole Company Division of Castle & Cook.

C. Maher Warehouse Corporation."

97.

MR. KLONSKY: Did you say 97, Mr. Reid?

MR. REID: 97.

"Q State who paid for the loading and stowage?

"A This third party defendant."

MR. KLONSKY: Mr. Reid, before we leave this could I read one paragraph here?

MR. REID: Yes.

MR. KLONSKY: Number 99.

Number 100.

"Q Did Chios Shipping Company, Limited participate in the discharge of the pallets of pineapple from the number 3 lower hold?

eoh28

"A The cargo was loaded, stowed and trimmed under the supervision of the master of the Chios and his officers and agents."

MR. REID: Your Honor, he has just quoted from the charter party of law for your Honor to construe.

THE COURT: Yes.

MR. REID: I would like to read from the interrogatories of Chios addressed to Maher Stevedoring Company and Maher's answers.

22.

"Q Was a cargo stowage plan furnished to you prior to the discharge of the Chios?

"A Cannot be determined at this date six years after the accident. However, it is usual for vessel's agents to supply stevedores with copy of stowage plan."

25.

"Q Were the cartons of canned fruit or pallets of pineapple being handled by you and your employees at the time they fell?

"A Pallet was on Hi-Lo operated by Alonzo Perry."

26.

"Q If so, state by whom and in what manner the pallets of pineapple were handled and where they were being moved from and to what place.

eoh29

"A A pallet was being taken from stow in number 3 hold of the Chios in order to be unloaded from the vessel."

27.

"Q State and describe how it came about that the cartons of canned fruit or pallets of pineapple fell.

"A Pallets split in half and carton from pallet fell off."

30.

"Q If the pallet broker or came apart, was the pallet and its broken parts saved or preserved?

"A No."

34.

"Q If you do not now have the pallet and its broken parts, state, when, where and in what circumstances they left your custody and control?

"A Unknown."

35.

"Q Was the cargo of pallets of pineapple referred to in the cargo stowage plan as being stowed in number 3 lower hold of the SS Chios inspected by you before the commencement of discharge of the said cargo?

"A No written report issued, but cargo is visually viewed before discharged."

Number 36.

eoh30

"Q If so, please state, A, how many were stowed where and B, describe what you saw in regard to how the said cargo was stowed and how the adjacent cargo and the cargo above it was stowed and whether any pallets or cartons were broken or came apart.

"A A. Stowed three pallets high.

B. No trouble with any other pallet before subject pallet broke."

41.

"The fixture, if any, used for lifting them, their location and construction. Also the gear and equipment if any used and their location, construction and ownership.

"A Hi-Lo owned by Maher Stevedoring Co., Inc."

42.

"Q Were the pallets of Pineapple moved in the the number 3 lower hold by a forklift truck?

"A Forklift also called Hi-Lo."

"If so, state how and from what point to what point and what they were placed upon.

"A From stow to square of hatch for discharge."

44.

"Q Who owned and operated the forklift truck?

"A Maher Stevedoring Co., Inc."

46.

eoh 31

"Q A. Who were the shippers, B, consignees of the pallets of pineapple and C, to whom was delivery to be made?

"A Upon information and belief Dole Pineapple was the shipper, consignee and person to whom delivery was made."

65.

"Q Who engaged you to discharge the pallets of pineapple in number 3 lower hold?

"A States Marine Lines, Inc."

Mr. Kenny, yesterday I believe you said that you would stipulate that you paid them?

MR. KENNY: They don't work for nothing, Mr. Reid. We will stipulate that States Marine paid us, yes.

MR. REID: That is what I mean.

"Q Was the engagement pursuant to a contract?

"A Yes."

67.

"Q If so, was the contract oral or written?

"A Upon information and belief oral."

Your Honor, I have the general arrangement plan of the vessel which we have referred to on previous occasions and I would like to introduce it now in evidence.

MR. KLONSKY: Is this the upside down plan?

MR. REID: This is the upside down plan.

(Defendant Chios Exhibit O received in evidence.)

xx

eoh 32

MR. REID: If the Court please, I have here a copy of safety and health regulations for longshoring and I request that the Court take judicial notice of that.

THE COURT: Which provision?

MR. REID: The safety and health regulations for longshoring.

Section 1504.67 called pallets.

THE COURT Would you give me the section number again, please?

MR. REID: 1504.67.

THE COURT: Having to do with pallets?

MR. REID: Yes.

THE COURT: Would you hand it up, please.

MR. KENNY: Your Honor--

THE COURT: Just a moment, please, I am reading something.

MR. KENNY: The effective date of those regulations, I think it is on the front.

THE COURT: June '66.

MR. KENNY: Thank you.

(Pause)

THE COURT: Do you have anything further, Mr. Reid?

MR. REID: Just a question and answer to the deposition of the plaintiff taken by Chios, Maher and States

eoh 33

Marine on April 11, 1974.

MR. KLONSKY: Just a moment, Mr. Reid. What page did you say?

MR. REID: Page 51, line 21.

"Q Did you see that pallet that you had just put on the hook leave the ground, leave the deck?

"A Well, I believe that it was hoisted, but I don't know."

THE COURT: Whose deposition is that again?

MR. REID: Plaintiff's.

Chios rests its case, your Honor.

THE COURT: All right.

MR. KLONSKY: Your Honor, I join Mr. Reid in requesting that Section 1504.67 captioned Pallets of the Safety and Health Regulations be accepted in evidence and read to the jury.

THE COURT: Mr. Reid's suggestion was that the court take judicial notice of the regulation.

MR. KLONSKY: Will your Honor read it in her charge?

THE COURT: We will get to the chages later.

Mr. Kenny, do you have anything?

MR. KENNY: Maher Stevedoring rests, your Honor.

THE COURT: Mr. Larsen for States Marine.

eoh 34

MR. KENNY: Your Honor, I have a motion.

THE COURT: Do you have any evidence?

MR. LARSEN: I would, your Honor, but in the order of procedure I would think I would make my motion to dismiss Mr. Reid's --

THE COURT: Do you have any evidence or do you rest at this time?

MR. LARSEN: Against Mr. Reid, no, I do not. I rest in defense of my case against Mr. Reid.

THE COURT: Mr. Brady, do you have any evidence?

MR. BRADY: I would read the deposition or part of it of Mr. Lantelme, just a short portion.

THE COURT: All right.

You may proceed.

MR. BRADY: Thank you, your Honor.

Your Honor, reading a portion of the deposition of States Marine Lines by Peter Lantelme, which was taken by the third party plaintiff.

I wish to read from page 53, questions by Mr. Kenny addressed to Mr. Lantelme.

Line 15.

"Q Mr. Lantelme, was this a common cargo for States Marine to carry from the Pacific Ocean to Port Newark?

"A Yes.

eoh 35

"Q Of prepalletized pineapples, is that correct?

"A Yes.

"Q During the course of your turn with States Marine or its successor company, have you handled cargo claims made against States Marine by Dole or its underwriters with regard to prepalletized pineapples?

"A Yes.

"Q Have you ever declined one of these claims on the basis of the fact that the pallet broke during loading or during the voyage or during discharge due to the fact that it was a weak or insufficient pallet."

MR. KLONSKY: Before he reads the answer, I object to the question. First, Mr. Lantelme was here and we did not go further reading the deposition because of that reason. He was subject to subpoena.

Secondly, it is not shown that he is the person who would handle this particular claim and this particular damage and, thirdly, even if he has no knowledge of any other breaking, that has no purpose in this case because it is conceded that there was a breaking of the pallet.

THE COURT: Mr. Brady, as the attorney representing Castle & Cook does have the right to read that deposition as against Chios and the opposite party that took it for any purpose, even though the witness was in fact present.

eoh 36

Proceed.

MR. KLONSKY: Against the plaintiff, too?

THE COURT: It is, yes.Plaintiff was present at the taking of that deposition.

MR. KLONSKY: He was represented, yes.

THE COURT: Proceed.

MR. BRADY: The answer is:

"A To my knowledge I have never seen a claim where a pallet broke.

"Q And in how many years is that?

"A Pineapple claims?

"Q Yes.

"A Since 1962. The answer was eight years but it seems to have been corrected to 12.

"Q Eight years?

"A Yes."

I have nothing further, your Honor.

THE COURT: All right, then Castle & Cook rests, is that it?

MR. BRADY: Yes, your Honor.

THE COURT: All right, at this time we are going to excuse the jury until 2 o'clock at which time ladies and gentlemen, the lawyers are going to sum up their case after which the court will probably charge the jury depending upon

* * *

eoh 38

MR. KLONSKY: Yes, your Honor.

THE COURT: All right.

MR. KLONSKY: The Lantelme deposition, page 55. Questions by Mr. Reid.

"Q Now you say that these cartons are all glued together and glued on the pallet?

"A Yes.

"Q So if a pallet was to break then the entire packaging all glued together would come down, would it not?

"A What I think would happen?

Mr. Kenny: Yes.

"A (Continuing) It seems to me they would all fall apart.

"Q If they wareglued together they would fall in itself and in striking rebound.

"A I guess you would have to see one. You mean they would come down as one big pallet without the pallet boards. I think they would break apart, I don't know.

"Q It is your opinion that if the pallet came apart then the cartons would come apart?

"A Yes, because the cartons are glued to the pallet too.

"Q But the cartons are glued to themselves one to the other?

"A Yes, also.

eoh 39

"By Mr. Klonsky:

"Q Would the heat have anything to do with the glue coming apart, the glue running?

"A The heat?

"Q The heat.

"A I don't know.

"Q Do you know the nature of the glue, the type?

"A No."

That is all.

MR. LARSEN: Thank you, Judge Motley.

I am reading from interrogatories addressed by Chios Shipping to Castle & Cook.

Number 1. How many prepalletized packages of cartons of pineapple were delivered to be loaded aboard the Chios?

"A 72,506 cases of product were loaded aboard the Chios.

Number 2. Where, when and by whom (address) where they loaded aboard the Chios stating the holds, their level and the number stowed in each place.

"A The product was loaded aboard the Chios by a local stevedoring outfit (Minobros) under contract with Dole Philippines. Chios Shipping Co. would know the holds, level, number stowed at each place. Dole Philippines, Inc.

Koh 40

delivered the product to the document MS Chios, Dadiangas (Cotaboto, Republic of the Philippines) see attached documents which are in evidence.

Number 7.

"Q Were the cartons fastened to one another and the pallet in any way whatsoever. If so, state, one, the name, kind or type of fastening material, two, the quantity used for each carton and the pallet, three, the place applied on each carton and the pallet, four, the manner or means by which it was applied and, five, if applied by machine in lieu of a notice to produce attach photograph of the machine.

"A The product was packaged at Dole Philippines, Inc. (Polomolok) South Cotabato Philippines. Dole Philippines, Inc. no longer has information as to whether the canned product on the Chios was packaged into the cases."

I'm sorry, I read the wrong answer, your Honor.

"Q Were the cartons fastened to one another and the pallet in any way whatsoever. If so, state the name, kind or type of fastening material, the quantity used for each carton of the pallet. Three, the place supplied in each carton and the pallet. Four, the manner and means by which it was applied and five, if applied by machine, in lieu of a notice to produce attach photograph of the machine."

The answer correctly this time:

eoh 41

"A. Palletizing glue.

B. Two strips.

C. On tops, bottoms.

D. By hand.

E. A dash."

"Number 9, when, where and by whom, address where the prepalletized packages transported from the place of origin to the place of delivery for loading aboard the Chios."

MR. BRADY: Isn't this very duplicative. Mr. Klonsky read these and Mr. Reid read these.

MR. LARSEN: I admitted as much before.

THE COURT: Why are you reading them?

MR. LARSEN: As a matter of my case.

THE COURT: We can stipulate you would read the same thing.

MR. LARSEN: All right, I will so stipulate.

THE COURT: All right.

MR. LARSEN: That completes my case against Castle & Cook, your Honor.

THE COURT: Do all parties in this case rest at this point?

MR. LARSEN: I only wish the Court to take judicial notice of the longshoring regulation which you have in my

eoh 92

THE COURT: Do youwant to make the same argument, Mr. Larsen?

MR. LARSEN: Yes, I would make that same argument in the event that I were held liable to Mr. Reid. I don't know if there is any further argument on this particular issue in the case.

THE COURT: Incidentally, what is Mr. Reid's claim against you?

MR. LARSEN: That is what I wanted to go into.

THE COURT: All right.

MR. LARSEN: Your Honor, at this time the third party defendant states Marine Lines moves for a directed verdict in its favor in respect of the case of the third party complaint of Chios Shipping against States Marine Lines.

As your Honor knows from hearing the testimony in this case, this vessel was under time charter, under a time charter approved by the New York Produce Exchange and the interpretation of the important clauses of which have been ruled upon by many cases which have been presented to the court in my trial brief.

This particular clause reads as follows, this is clause 8: "That the captain shall prosecute his voyages with the utmost dispatch and shall render all customary

assistance with ship's crew and boats. The captain (although appointed by the owners) shall be under the orders and directions of charterers as regards employment and agency. And the charterers are to load, stow and trim and discharge the cargo at their expense under the supervision of the captain who is to sign bills of lading as presented in conformity with mate's or tally clerk's receipts without prejudice to this charter party."

Your Honor, the cases that I have handed up to the Court before the trial in this case indicate that this particular clause makes it the charterer's responsibility to load, stow, trim and discharge the cargo, but under the supervision of the captain of the ship who was appointed by the owner.

The time charterer merely rents space, carrying space aboard this ship. The cargo operations under the cases are under the control of the captain and the charterer's obligation to pay for the cargo operations does not make the charterer responsible for the conduct of that operation.

These time charterers only takes over for carrying capacity.

Mr. Reid anticipating what he is going to say will argue that the Sea Star case, in which he was involved, holds that it is the obligation of the charterer to load

eoh 94

and stow and trim.

Assuming that case to be accurate, and I don't admit it, nonetheless that case, as Mr. Reid knows from his handling of it, turned on the duty imposed on the charterer to load, stow and trim and the evidence was patently clear in that case that there was a failure by the charterer. There were coils of steel loaded into the hatch or in the hold of the vessel by World Bulk on the testimony of an expert marine surveyor determining that the stow was defective and that the coils rattled around during the voyage, there was a recovery of cargo damage. It was not a tort case.

THE COURT: In this case the evidence is that you employed the stevedores.

MR. LARSEN: We paid for them, yes.

THE COURT: Just a minute. The question is did you employ them?

MR. LARSEN: I employed the stevedores an independent contractor to discharge the ship under the supervision of the master of that vessel.

THE COURT: It is your claim, what, that the master is at fault here?

MR. LARSEN: No.

THE COURT: What is your claim?

eoh 95

MR. LARSEN: I am saying that I am not at fault. In other words, the burden of proof of Mr. Reid in his third party complaint is to show that we did something negligent with respect to trimming, loading and stowing this ship.

THE COURT: The stevedore is your agent in this instance, is he not?

MR. LARSEN: No, your Honor, the stevedore is an independent contractor. he is an independent contractor. I don't think there is any dispute about that.

The burden in this case for Mr. Reid on behalf of Chios is to show we did something negligent with respect to loading, stowing and trimming the cargo of this ship.

I submit to your Honor in all candor there is not one scintilla of evidence in this case that states Marine Lines breached its duty in any respect with regard to the loading, stowing and trimming of cargo. All of the documents which are uncontroverted show that there were regular surveys, inspections made of the cargo. It was all in good order and apparent condition. We had it endorsed and clean bill of lading. The mate's receipts which were clean. We had the survey by T.D. Baker which showed that the cargo was properly stowed.

Where in this record, your Honor, is there any

eoh 96

evidence that states Marine was negligent as claimed by Chios Shipping Company? So assuming the standard that Mr. Reid--

THE COURT: What is your motion?

MR. LARSEN: For a dismissal of the third party cla[illegible].

THE COURT: Against States Marine Lines.

MR. LARSEN: Yes.

THE COURT: I will hear from Mr. Reid on that.

MR. REID: In connection with the charter party itself, your Honor, clause 8, the supervision of the master, which Judge Friendly has pointed out in Nichimen Company v. MV Farland, 462 Fed. 2d 319.

It says that the captain can be held -- put it this way. Under the supervision of the master means that the master can veto the stowage.

Let's look further and see on the facts of the case what States Marine did.

THE COURT: All right.

MR. REID: They took over the loading, trimming and discharging of this ship under the charter. They hired the stevedores and they paid for them.

They had their own people as agents in the Far East to supervise the loading and I have introduced in

eoh 97

evidence those survey reports at the loading ports in the Philippines, Hong Kong, Keelung and Kobe with all the photographs which they took.

They took over the supervision. There is not any evidence in this case that they insisted, if we assume like they might argue that the captain was under some sort of affirmative duty, which I contend he is not, even assuming that he may have been under some affirmative duty, they didn't let him perform that duty.

THE COURT: Of doing what?

MR. REID: Of loading and stowing the cargo. They got their own independent surveyors to do it and they did it and it is shown in the survey report. They took it over.

THE COURT: What do you claim that they did which caused the injury here?

MR. REID: I am claiming here that this was their operation. They issued the bills of lading, cargo manifests, every important document or paper was issued in their name, every survey report was issued in their name.

Now, we get down to what they may have done which might have been negligent. I quite agree up to the point of discharge that they didn't do anything, but I say when it comes to their duty to unload that their duty to unload

eoh 98

the cargo doesn't merely require them being careful in the use of the cargo and not damaging the cargo; that means that they must be careful in discharging that cargo not to injure third parties. I think it would be a very restrictive reading of a charter party to limit this to physical cargo damage because it says, they were under a duty to discharge and that means to discharge in a prudent and careful manner.

Now, the fact that they had a stevedore Maher, they can't delegate their contractual obligation to me by delegating it to some party because I have a contract with him and it says he is going to do it and I am going to look to him to do it, discharge it in a safe and reasonable manner. That is my position, your Honor.

MR. LARSEN: Your Honor, in answer to that I can only reiterate what I said before. There has been a complete lack of proof by Mr. Reid in the presentation of his third party case against my client States Marine that we did anything negligent; that we breached any duty running to the owner. Absolutely we did nothing on the record of this case. It is completely devoid.

THE COURT: The fact is that during your unloading operation you had an independent contractor do that and somebody was injured. We haven't resolved the issues here

eoh 99

as to how he was injured. Some of it depends on what the jury finds. I don't know how the complaint against you can be dismissed at this juncture.

MR. LARSEN: What you are saying is that I could be answerable in negligence to Mr. Reid for hiring Maher Stevedoring in and of itself and I don't think that is sufficient at all.

THE COURT: Your contract was to do what, hire a stevedore and forget about it? Was it your contract to unload this vessel in a safe and prudent manner?

MR. LARSEN: That's correct.

THE COURT: However you did it. Isn't that so? Your motion is denied.

With respect to the motion for directed verdict by all parties against Dole, it would seem to me that that motion should probably be made after the jury has decided the plaintiff's case against the vessel and that is what we will do when we come in at 2 o'clock.

The parties will argue the plaintiff's case against the ship and we will submit that to the jury and after we get the jury's verdict on that, we will then submit the other questions to the jury.

What I plan to do is to submit to the jury interrogatories.

* * *

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relate themselves to something a jury, only a jury can decide on and should decide on and not the court.

THE COURT: So we have two things. He was given light work on returning to work and he can't work in the hold you say as a result of this accident.

MR. KLONSKY: That limits his capacity.

THE COURT: That this will in the future affect his ability to earn a living. Is that it?

MR. KLONSKY: That's right, ma'am.

THE COURT: With respect to the plaintiff's case, as I have said, I think what we should do when we come back is present that case to the jury. In that respect, of course, I have already ruled that the plaintiff's case with respect to negligence is out of the case and the case will go to the jury on the issue of unseaworthiness and I will charge the jury as to that.

Do you have there the plaintiff's requests to charge?

MR. KENNY: Your Honor, one issue which has nothing to do with motions but it has to do with summations which I want to bring before the court. This is not the first time it was brought before the attorneys.

Your Honor, the third party complaint by Mr. Reid against States Marine does not contain a demand for

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a trial by jury. The answer by States Marine to the third party complaint of Chios does not contain a demand for trial by jury.

Therefore, I think the issues between Mr. Reid and Mr. Larsen because of the failure to demand a jury trial on this issue should be reserved to the court. As a result of this, your Honor, I would think that Mr. Larsen should not go before the jury in summation because he does not have a right to a jury trial.

THE COURT: If one party demands a jury trial and we have a jury trial the others are not entitled under the law to a jury trial.

MR. LARSEN: I maintain that is the case, that everybody gets a jury trial.

THE COURT: Yes, I think so.

MR. KLONSKY: Your Honor, I also ask in the first case the only one who should sum up is the ship owner and if we go on to the second one, that is when they should sum up.

MR. LARSEN: Plaintiff is an adverse party to me.

THE COURT: Yes, I think all parties have a right to participate in the case against the plaintiff.

MR. REID: Mr. Larsen has participated in this jury trial. He didn't raise that issue at the commencement. He

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marginal labor market where he cannot work on ships any more. He works in a warehouse, first as a cleaner and then as a Hi-Lo operator. How much longer will he be able to do that? The restricting aspect here is pain.

I would like to read something which was said about pain and which I think is very relevant to this case. Very few people who have been the victim of intense and prolonged pain ever receive an injury verdict that is anything like adequate for what they have suffered.

MR. REID: I object, your Honor. This is not evidence.

MR. BRADY: Please note my objection, your Honor. There is absolutely no basis for that kind of a comment.

MR. KENNY: I object as inflammatory, your Honor.

MR. KLONSKY: I believe I can read.

THE COURT: Yes, you can comment and argue the evidence relating to pain.

MR. KLONSKY: Thank you. Pain is not only unpleasant to endure, it is unpleasant to think about. The only change of a fair trial for the plaintiff on the issue of pain and suffering is to persuade the jury to steel themselves to the disagreeable task of looking at the shock-

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ing reality of what pain is and what it does to a man. It is human nature to keep our minds from the impact of other people's troubles as we must keep our minds from the thought of our eventual death. If we did not have that mental block we would all be the victims of such anxiety and concern that we could not stand it. We would become insane.

The trial lawyer and the trial jury have the duty to overcome that abhorrence and look at pain and see it for what it is. It is like opening a window into hell. When the time comes for a defendant to pay for the mystery he has inflicted, he asks that you take an attitude of tolerance towards pain as if it were nothing really worth a lot of money. He is asking that your mind tolerate pain which is something your body will never do. An hour of pain is a sample of hell. It is this sickening horror, this tool of torture, the scourge of mankind that you are asked to belittle and make excuses as to deny a man $10 a day as compensation. This defendant is like a man in the bible who was willing to show his sincerity with everything but money. When asked for that, he went away sorrowing though he had great possessions. If you believe in religion you believe that an omnipotent God thought nothing worse than supreme punishment in hell than to make it a place

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of pain. If you don't, then you believe that the accumulated imagination of man could imagine nothing worse.

This you have to look at because you took your oath to look at the issues as they are. This is the only opportunity the plaintiff has to be in a court of law. You must think in terms of future life expectancy, his potential future lost earnings because he will never be here again.

I wish that your finding for him would cure him, but it cannot and the next best thing is to compensate him fairly and adequately for what happened to him. This little man who tried to earn a living who had no prior disabilities and no recorded accidents and now, you saw him on the stand, how long it takes for him to think about an answer to a question. How limited he is in his movements. He did go back to work, but how much longer in the marginal labor or market will he be able to compete.

So let us go into damages. He was born in June 1919 in Spain and came to this country. For the four quarters before this accident of September 1st, 1968 he had earned a little over $10,000. That is the basis on which we would say $200 a week.

In April of 1969 he first went back to work, that is seven months. The doctor said he could have gone

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back in February, but he did not go back until April for reasons related to his physical capacity to work. It is proven by the fact that he is now not going into holds any more, climbing ladders down into the ship, pulling heavy weights as a hold man that he is limited in what he can do and whether he wants to compete for a job in the next five years or so where the port will be completely without the activity we have today, you would expect that he is going to be overlooked and not granted the opportunities to work that he would have without these injuries.

MR. KENNY: Your Honor, I object to that. There is no evidence in here as to what the activity of the port is.

MR. KLONSKY: I speculate that the port will be more discriminatory. All right, I withdraw that.

MR. BRADY: Objection, your Honor. Absolutely objectionable.

MR. KLONSKY: I withdraw it. If you look at the special damages relating to his lost earnings at $800 a month, which is 200 a week times seven months that is $5600. We stipulate that the amount of medical expenses are a little under $2,000, which is $1,985.

The special damages therefore come to $7,585. That is solid.

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THE COURT: Thank you verymuch, Mr. Klonsky.

Will the clerk make the announcement?

THE CLERK: The Court is about to charge the jury, any spector wishing to leave the courtroom will do so now or remain seated until the completion of the court's charge.

Marshal, lock the door, please.

THE COURT: Ladies and gentlemen, this is a civil action, as I told you when the trial commenced, which means that it is a case in which the plaintiff seeks to recover a sum of money to compensate him for physical injuries and lost wages which he claims he sustained as a result of the wrongful action of the defendant shipowner.

Now, you have to bear in mind that the mere fact that the plaintiff in a civil cases makes certain claims that is called a lawsuit does not in itself entitle him to an award of damages. That is because the law requires that before a plaintiff in a civil action can recover any money at all from a defendant, the jury must be persuaded that the plaintiff has proved his claim by a fair preponderance of the credible evidence.

Therefore, in this initial part of the charge I would like to call your attention to the fact that since this is a civil case, the plaintiff has what we call in law

the burden of proof.

Now, in a criminal case the government has the burden of proving to a jury that a defendant is guilty of a crime charged beyond a reasonable doubt, but in a civil case, such as this, the standard of proof is different. In a civil case the one who brings the action must satisfy the jury that he has proved his contentions by a fair preponderance of the credible evidence.

Now, this means that you should take all of the evidence in your minds, that which supports the plaintiff's contentions against that which supports the contentions of the defendant shipowner here, and you should then determine which has the more convincing force, which is more probably the correct version of what actually occurred here, which seems to you, in other words, to make more sense. Here we are talking about common sense.

Now, this does not mean that you should add up the number of witnesses on each side and actually balance them. We are not concerned with the quantity of the evidence, we are concerned with the quality of the evidence, which evidence is more likely to represent the true picture, as I said, of what actually occurred?

Should the conflicting evidence in this case be evenly balanced in your minds so you are unable to say that

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the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, which, as I have said in this case, is the plaintiff.

In short, what I am trying to say is this: I have said that plaintiff has the burden of proving his case by a fair preponderance of the credible evidence. We do not have any scales in a courtroom upon which you can place the evidence and weigh it and actually determine which side outweighs the other, but for those of you who have sat on juries before, you have probably heard other judges say that you have to imagine in your minds the scales of justice, so to speak, and the party having the burden of proof must tip that scale slightly in his favor.

If it remains evenly balanced or if it tips down all the way to the defendant's side, then the party carrying the burden of proof has not sustained his burden. This necessity to sustain the burden of proof applies to all of the claims made by the plaintiff, that is, his claims with respect to the accident, his claim with respect to the nature and extent of his injuries and the claim with respect to his lost monetary wages in the past and any future damages which he claims he has sustained.

Before discussing the plaintiff's claim and his legal

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theories in greater detail, I also want to tell you about one of your major functions in deciding what the true facts in this case are and that is your function to determine the credibility or believability of the witnesses who testified here before youon the witness stand, your function in determining the weight to be accorded their testimony.

You have heard testimony on both sides and some of the testimony, as you well know, is conflicting. The question, therefore, is how do you determine the weight to be given to the testimony of the various witnesses and how do you determine if they are credible or believable.

In your search for the truth you use your plain, every day common sense. That is why you are here.

We certainly hope that you are average men and women and we want you to bring to this case your daily experiences in life and your common sense so that you can make an adjudication as to his telling the truth and who is not.

Now, there is no mystery about your actions and there is no mystery about your services on a jury.

Again, you are supposed to bring to this case your experiences in life and make an adjudication based on the evidence in the case, but at the same time I emphasize again in evaluating the evidence you have to use your common

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sense. You have seen the witness who took the stand. The testimony of other witnesses has been presented to you by way of the reading of their testimony which was taken before trial in what we call depositions.

Now, as to those witnesses who actually took the stand, as I said, you have heard their testimony. You observed the witnesses. You observed their demeanor and manner while here on the witness stand.

Now, you should ask yourselves with respect to that testimony certain relevant questions. For example, you should ask yourselves how did these witnesses impress you? Did the witnesses appear to be testifying frankly, candidly, fairly?

In other words, in evaluating the testimony and credibility of witnesses, you apply your common sense and experiences precisely as you do in determining an important matter in your own lives, that is, whether you have to decide whether someone has given you a true picture of what actually occurred. Almost every day of your lives you are called upon to make a determination as to whether you are going to believe someone or not and you draw on your common sense and experiences in connection with that determination.

You are to use your common sense and experiences the

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same way here.

You should consider, as I assume you naturally will, the witnesses background and, as I have said before, his candor, his demeanor, his possible bias, means of information, and accuracy of recollection.

You should consider whether the witness' testimony is supported or whether it is contradicted by other credible evidence and circumstances in the case. You should particularly consider whether the witness has an interest in the case and that applies to witnesses on both sides.

Whether a witness has an interest in the case, there is a temptation to color or exaggerate the testimony or possibly even to withhold damaging testimony. You should weigh all of these factors throughout your deliberations, but I simply say that interest is an element to be considered in determining the credibility or believability of witnesses and the weight to be accorded their testimony.

If you find that any witness has made a material misstatement of fact with the intention of misleading you, you may disregard that portion of the witness' testimony which you do not believe or you may disregard all of it or you may accept that part which you find reliable and disregard the rest of it.

You may also consider the strength or weakness

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of a witness' recollection, but sometimes while a witness may not be intending to deceive you, he may have a weak recollection on the subject or be incapable of accurately setting forth what he observed or did or even without realizing it he may not have been aware of the actual facts as they occurred. You may consider that in judging the credibility of a witness.

Now, in this connection I want to tell you a word about expert witnesses. You will recall that we have had expert witnesses testify here. We had the doctors and then we had an expert in the person of a marine carpenter.

Now, each expert gave testimony concerning his qualifications as an expert in his field and whether a case involves a matterof science or art or some field requiring special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the information of the Court and the jury.

The opinions stated by each expert who testified before you were based on particular facts as the expert himself observed and testified to them before you or were based upon facts which the attorney who questioned him asked him to assume for the express purpose of stating an opinion based on the assumed facts. Of course, these assumed

facts were based on facts in the record.

You may reject an expert's opinion if you find the facts to be different from those which formed the basis for his opinion.

You may also reject his opinion if, after careful consideration of all the evidence in the case, expert and others, you disagree with the opinion.

In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability and credibility as testimony of any other witness.

It is given to assist you, as I have said, in reaching a proper conclusion and it is entitled to such weight as you find the expert's qualifications warrant and must be considered by you, but is not controlling on your judgment.

The legal theory upon which the plaintiff is proceeding and which you must consider in determining whether the defendant Chios Shipping Company, Limited, the owner of the vessel involved, is liable to the plaintiff is called the doctrine of seaworthiness.

Now, as I mentioned earlier, the doctrine of seaworthiness is an ancient concept found in the maritime

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law which is applicable to vessels.

The plaintiff claims that he was injured because Chios, the owner of the vessel, breached its legal duty to him to provide and maintain a seaworthy vessel.

In order for plaintiff to recover it is necessary for you to find that he has sustained the burden of proving that the vessel in this instance was, in fact, unseaworthy.

The plaintiff claims that the defendant shipowner failed to maintain a seaworthy vessel on three grounds.

First. He says the shipowner failed to provide him with a safe place to work, that is, the shipowner failed to provide a shelter area in the No. 3 hatch so that plaintiff could get out of the way of a draft while it was being lifted from the hold.

Second. The plaintiff says that the shipowner did not properly supervise the method of unloading the cargo so that it was done in a reasonably safe manner.

In other words, he says that the unloading here was done in an improper and an unsafe manner.

Finally, the plaintiff says that the vessel was unseaworthy in that the pre-palletized cartons of pineapple were not adequately constructed, thereby rendering the vessel unseaworthy.

Now, in determining the question of seaworthiness,

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you will not consider whether the defendant shipowner had any actual or constructive knowledge of any defect in the cargo or whether the defendants' employees acted as reasonable men who have acted under the circumstances. Those factors are not elements of unseaworthiness and should not be considered by you in deciding plaintiff's claim against the defendant shipowner.

In other words, you are not to consider how the vessel became unseaworthy if you find that it was, in fact, unseaworthy in at least one of the respects claimed by the plaintiff.

If the vessel was unseaworthy because the work area was unsafe or if the unloading was improperly supervised or if the cargo was placed in a faulty pre-palletized container and if you find that at least one of those claims of unseaworthiness directly contributed to the plaintiff's injuries, then the plaintiff is entitled to recover.

Under that ancient maritime law, the owner of a vessel is under a duty which he cannot delegate to anyone else to provide and maintain a seaworthy vessel.

Now, the question I am sure which is in your minds is what is this requirement of providing and maintaining a seaworthy ship? It simply means that a vessel owner, such as the defendant Chios in this case, is under

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an absolute duty, which he cannot delegate, as I have said, to someone elsse to see that the vessel itself and its equipment, the stowage of the cargo, the cargo containers and the crew are not defective.

In other words, the doctrine is not limited to the vessel itself, but applies to equipment, appurtenances, crew and the cargo.

Now, under this obligation imposed by the law on the owner of the vessel, the best possible vessel, equipment, cargo, stowage and crew are not required and the defendant is not under a duty to provide an accident free ship, but the vessel owner must provide a vessel, equipment, stowage, cargo containers and crew which are reasonably fit for the use for which they are intended.

The duty to provide a seaworthy ship can thus be breached by supplying a defective vessel. A defective equipment or improper stowage of cargo or defective cargo containers or by supplying officers or crew men who are not reasonably competent or by failing to supply equipment or containers necessary for the carrying out of the unloading of cargo with reasonable safety.

It can also be breached by providing a work area which is not reasonably safe and adequate for the work to be performed or by providing insufficient manual assistance

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to do a job or insufficient supervision by officers or crewmen when and where required to do a job or to perform a particular task in a safe and prudent manner.

Under the doctrine of seaworthiness the owner of a vessel is liable to an injured longshoreman if the vessel or its equipment or its stow or cargo or method of unloading or supervision of the unloading or crew are found to be not reasonably fit for the purpose intended, even though such unseaworthiness results from no fault on the part of the vessel owner or its employees or agents, unseaworthiness results in liability on the part of a vessel owner, with an injured longshoreman, without proof of any fault on the part of the vessel owner or its agents or employees.

Where a condition or set of conditions renders a vessel or parts thereof unseaworthy or any of its equipment or cargo is essentially a question of fact for the jury. The jury, however, must accept the Court's charge on the nature of this strict obligation and divorce from its mind any prior charges or opinions relating to concepts of law where a person might be injured ashore. It is consistent to find for the plaintiff against the shipowner, whose obligation to the plaintiff is non-delegable, continuing and absolute, though it may be concluded that

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the primary active fault would be with the stevedore, who employed the plaintiff, or the other party defendants.

The plaintiffs recovery is not predicated upon whether the third parties also were at fault and might later be required to indemnify the shipowner.

A seaman does not assume the risk of injury from the unseaworthiness of the vessel. However, in nearly every occupation aboard ship there is some inherent and unavoidable risk which does not arise out of unseaworthiness. A seaman must assume such risk when he enters upon his calling and he may not recover for such injuries resulting from these unavoidable risks which do not arise out of unseaworthiness.

However, as I have said, a seaman does not assume the risk of injury from unseaworthy conditions. He does not assume the risk even from an obvious danger or condition, if the cause of the danger is the shipowner's unseaworthiness or the ship's unseaworthiness. That is, defendant Chios' failure to provide plaintiff with a safe place in which to work or to provide proper supervision or the existence of cargo aboard ship which is in the process of unloading and then it falls apart because of a faultily constructed pallet.

If you find tha- the ship was unseaworthy,

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you must then determine whether such unseaworthiness was the proximate cause of the plaintiff's injury.

Now, proximate cause means that there must be a direct causal connection between the unseaworthiness, which you find, and the plaintiff's injuries. To constitute proximate cause, in other words, that particular cause must actually contribute to the result.

Therefore, plaintiff must prove by a fair preponderance of the credible evidence the injuries and damages which you find he sustained were proximately caused in whole or in part by the ship's unseaworthiness.

Plaintiff is not required to offer evidence which positively excludes every other possible cause of the physical or emotional disturbances of which he complains. It is sufficient if you find that the accident in question was an independent cause of injury or was an accelerating provoking, irritating or hastening factor in the ultimate result.

Now, in addition to denying that its vessel was unseaworthy and that this unseaworthiness was the proximate cause of the plaintiff's injury, the defendant vessel owner alleges as a further defense that negligence on the part of the plaintiff was the proximate cause of any injuries and subsequent damages which the plaintiff

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may have sustained.

Now, this defense is known as the defense of contributory negligence. Contributory negligence is fault on the part of a person injured which is entirely responsible for the accident or which contributed in some measure to the accident.

In maritime cases, such as this, a plaintiff who was negligent in part is not barred completely from recovering from the defendant. He is barred completely from recovery only if you should find that his negligence alone was completely responsible for the accident.

In determining whether plaintiff was contributorily negligent you must consider that just as a defendant is required to use reasonable care to avoid injuring the plaintiff, the plaintiff is required to use reasonable care to avoid anything which will cause injury to himself.

If you find that plaintiff omitted to do anything which a reasonably prudent man would do under the circumstances in this case or that he did something which a reasonably prudent man would not have done under the circumstances in this case, and that it be brought about or contributed to his accident, then you must find that the plaintiff was guilty of contributory negligence.

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In short, plaintiff is held to exercise that reasonable degree of care which a longshoreman with his experience would have used underthe circumstances.

Now, contributory negligence is an affirmative defense which means that the burden of proving that plaintiff was contributorily negligent rests on the defendant vessel owner who makes this claim. In seeking to establish thatplaintiff's contributory negligence, defendant must prove that negligence by a fair preponderance of the credible evidence. In other words, the standard of proof is the same.

Thus, defendant on this issue has the same burden of proof that the plaintiff had in proving the defendant's unseaworthiness, that the vessel was unseaworthy.

In considering the issue of contributory negligence it is your duty to consider all the evidence which has been introduced in this case, by the plaintiff or by any of the defendants.

Therefore, if you find from a preponderance of the evidence in the case that the defendant was negligent, but that plaintiff himself was also negligent, that is, the plaintiff's fault also contributed or constituted the proximate cause of the injuries which plaintiff sustained, then, as I have said, since this is a maritime case, you have to

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compare the negligence of the parties and return a verdict in favor of the plaintiff in a reduced amount based upon that comparison.

Now, the proper procedure to be followed by you in comparing the negligence of the parties and returning a verdict in favor of the plaintiff for a reduced amount based upon that comparison is as follows:

First, you determine the full amount of all damages, if you make an award for damages, which you find the plaintiff has sustained as a proximate result of the accident.

Next, you compare the negligence of the parties, determining in what proportion, expressed in terms of a per cent, that the plaintiff's own fault contributed to his injuries.

Then you deduct from the full amount a sum equal to that per cent which you find was the plaintiff's contributory negligence.

Then you return a verdict in favor of the plaintiff for that reduced amount.

Now, by way of example and only by way of example, you may find that the plaintiff was 10 per cent negligent, 25 per cent negligent, 50 per cent negligent or a hundred per cent negligent. If you should find that the plaintiff's negligence alone was entirely responsible

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for the accident, then, of course, you would return a verdict for the defendant shipowner.

Now, we come to the question of damages. If on all the evidence you find that the plaintiff has sustained his burden of proof that the vessel was unseaworthy and that the vessel's unseaworthiness was a proximate cause of plaintiff's injuries, then and only then do you reach the question of damages. Of course, if you find that plaintiff has failed to carry his burden with respect to the issue of unseaworthiness, that would end the case. You would not have to consider the issue of damages at all. You would return a verdict in favor of the defendant vessel owner.

Incidentally, the fact that I instruct you on the issue of damages does not mean that you are to assume that the Court is of the view that plaintiff is entitled to a verdict or indeed that the Court has an opinion as to how the case should be decided. That is, as you already know exclusively within the province of the jury. But, of course, I must instruct you on the issue of damages in the event that you do find that the plaintiff has sustained his burden of proof with respect to unseaworthiness and proximate cause and is therefore entitled to an award of damages.

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Now, the purpose of the law is to award as far as possible just and fair compensation for the loss which directly flows from the wrong done to an injured plaintiff.

In other words, any damages awarded must be perfectly compensatory and reasonable, neither inadequate nor excessive. This matter of damages rests in your sound discretion.

In this respect again you will be guided by your common sense and experience, but your award must bear a reasonable relationship to the injuries and the monetary damages actually sustained by the plaintiff.

In other words, in assessing damages, your aim should not be to make the plaintiff rich at the expense of the defendant. Personal feelings or sympathy or bias against a party or in favor of a party or prejudice against a party or in favor of a party should not enter into your consideration. All parties stand equal before the law, whether they are individuals or corporations.

Your aim should be to award the plaintiff a sum of money which will be fair and reasonable compensation for the losses which you find he has actually sustained as a direct result of this accident.

Again, plaintiff has the burden of proof with respect to the nature and extent of his injuries and with

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respect to the resulting monetary losses, such as lost wages directly attributable to the accident on board this ship.

The plaintiff is entitled to damages only for those injuries and losses which are attributable to or which were proximately cuased by the vessel's unseaworthiness.

Now, with respect to specific items of damage. Plaintiff, if he has sustained his burden of proof as to damages, is entitled to compensation for the following claimed items of damage in this case.

First. Past loss wages and you have to find by considering the evidence in the case what his lost wages are from the date of the accident to the present.

Second. The plaintiff is entitled to an award for medical expenses which he claims are in the amount of $1,985.26.

Third, the plaintiff is entitled to an award for past pain and suffering, which includes mental anguish or anxiety. That is, pain and suffering then incurred by the plaintiff from the day of the accident to the present, which includes any time that you find he spent in a hospital.

Four. The plaintiff is entitled to an award for future pain and suffering. Again including mental anguish.

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Five. He is entitled to an award for future lost wages.

Now, as I have said, in considering the elements of damage you consider pain and suffering past and future. If you find that plaintiff has already endured pain and suffering and if you find that plaintiff is reasonably certain to endure pain and suffering in the future as a result of the accident, he is entitled to be compensated for it.

Here, however, I must tell you that the only yardstick for measuring pain and suffering or the award, that is, for pain and suffering is your own common sense and good judgment based on the evidence in the case and your experiences in life. In other words, there is no hard and fast rule covering this matter of compensation for the pain and suffering.

Your award, however, must be based upon a full consideration of all the credible evidence in the case and must bear a reasonable relationship to that evidence as to the nature and extent of plaintiff's injuries, that is, whether they are permanent or only temporary in nature and as to the pain and suffering which the evidence shows plaintiff has already endured and is reasonably

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certain to endure in the future as a result of this particular accident.

You are not permitted to award speculative damages. This means you are not to include in any verdict compensation for prospective losses which, although possible, are wholly remote and conjectural.

Any award for future pain and suffering must therefore be based on a finding by you from a consideration of all the evidence that there is a reasonable likelihood that plaintiff will experience pain and suffering in the future.

Mental anguish, as I indicated before, includes anxiety and may arise out of physical injury.

Whether there is such mental anguish depends also upon the nature and extent, character and probable duration of the injury, that is, whether the injuries are permanent in nature or only temporary in nature.

If you find that by reason of the nature and extent of his injuries plaintiff has sufferedanxiety or if you find that as a consequence of his injuries plaintiff is physically handicapped in performing tasks and activities of day-to-day living and that this handicap has in turn caused plaintiff anxiety or if you find there is a reasonable likelihood that such handicap and consequent

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anxiety will continue in the future, you may consider this in assessing damages for pain and suffering.

Now, according to a table, which I have here and which you are going to be permitted to take into the jury room, if you so desire, there is information regarding life expectancy of a person of the plaintiff's age and sex.

Now, according to this chart, which the Court takes judicial notice, it indicates that a person who is today 55 years of age has a life expectancy of 19.6 years.

Now, this fact is to be considered by you in arriving at the amount of damages, if any, to be awarded for future pain and suffering. Life expectancy as shown by a life expectancy table is merely an estimate of the probable average remaining length of life of all persons in the United States of a given age and sex and that estimate is based upon a limited record of experience.

So the inference which may reasonably be drawn from life expectancy as shown by a table applies only to one who has the average health and exposure to dnager of people of that age and sex. In determining the reasonably certain life expectancy of this plaintiff, the jury should consider in addition to what is shown by the life expectancy table all other facts and circumstances in evidence

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bearing upon the life expectancy of this plaintiff including his occupation,his habits,his past health record, his health at the time of the accident and his present state of health.

With regard to future pain and suffering, the plaintiff has the burden of proving, as I have said, that there is a reasonable likelihood that he will experience pain and suffering in the future. If plaintiff has sustained this burden, your computation of of an award for future pain and suffering must take into account the period of time over which it is reasonably certain pain and suffering will be sustained. This refers, as I have indicated, to the plaintiff's life expectancy.

Now, in addition, any award for future pain and suffering must be discounted to its present value tables. In order to do that you will have to divide the total award which you make for future pain and suffering by the plaintiffs life expectancy, which, as I have said in this case appears to be 19 years and then arrive at an annual award figure for each year.

You then use the present value tables on this same card, which is on the other side. To find the present value of a dollar invested at the rate of 6 per cent a year over a period of 19 years, you then multiply that present

value of a dollar by the annual amount which you found for pain and suffering.

You will then have the present value of the award for future pain and suffering over a period of 19 years.

You do the same for any award for future lost wages and I will explain this again in that connection, but the computation is simply made, as I have indicated, by reference to this chart which explains precisely how it has been arrived at and as I have just explained it here. These instructions will be found on the card.

Now, in addition to claiming lost wages from the date of the accident to the present, plaintiff also claims future lost earnings resulting from reduced earning capacity, that is, earnings which he claims he would have received in the future had he not sustained a diminution in his future earning capacity.

Plaintiff claims that he will suffer a diminution in earning capacity in the future and that this is evidenced by the fact that, one, upon returning to work he was given lighter work in the warehouse.

Two. That he is now forced by reason of the accident to work on a Hi-Lo and can no longer work in the hold of the ship, thus lessening his ability to compete for hold jobs in the future in a tight job market and,

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three, the progressive nature of his disabilities makes him a less effective worker than he otherwise would have been without the injuries.

In connection with plaintiff's claim for lost future earnings, again plaintiff has the burden of proving there is a reasonable likelihood that but for the accident he would have had greater earning capacity in the future than he now has.

Also in this connection you must take into consideration plaintiff's work life expectancy. Now, according to this same table, plaintiff's work life expectancy is shown here as 11 years. That is indicated right on the card by simply pulling the card up to find his age and then reading across to work life expectancy.

However, the inference which reasonably may be drawn from work life expectancy tables only applies to one that has the average health and exposure to danger of people of that age and sex.

The jury should therefore consider in addition to what the table indicates as to work life expectancy of this plaintiff all other facts and circumstances in evidence bearing upon his work life expectancy, including his occupation, his past health record and his present state of health.

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I want to emphasize that you have to bear in mind the distinction life expectancy and work life expectancy.

Again, any award made for anticipated future lost wages must be discounted to its present worth as is true of any award for future pain and suffering.

Now, I shall explain again how that is done. If the jury should find that plaintiff is entitled to a verdict and further find that the evidence in the cases establishes a reasonable likelihood of future pain and suffering and future lost wages and award for such future pain and suffering and lost wages or either is made, then it becomes the duty of the jury to ascertain the present worth in dollars of such award since the award of future damages necessarily requires payment now for a loss which will not actually occur until some future date. Under these circumstances the result is that the plaintiff will be reimbursed in advance of the loss and so will have the use of the money which he would not otherwise have received until some future date but for the verdict.

Again, in order to make a reasonable adjustment for the present use interest-free of money representing a lumpsum payment of anticipated future loss, the law requires that the jury discount or reduce its present worth the amount of the anticipated future loss by taking, one, the

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interest rate which plaintiff could reasonably be expected to receive on an investment today of a lumpsum payment together with, two, the period of time over which the future loss is reasonably certain to be sustained. Then deduct from the total award for anticipated future loss whatever that amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time and include in the verdict an award for only the present worth reduced amount of the total future anticipated loss.

Again this computation is readily made by using the so-called present worth tables shown on this card and which shows the present worth of one dollar if that dollar were invested today at a particular rate of interest and over a particular number of years. As I have said, the interest rate which you should use in this case is 6 per cent and you can take this card into the jury room if you desire and make those computations.

Now, after you have made an award for each item of damage and having gone through all the computations relating to any future award, you must deduct any per cent of contributory negligence which you find plaintiff contributed to his accident. As I explained before, from the total award of all items of damage, if you find any contrib-

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utoary negligence on plaintiff's part, as I have said before, you must express that in terms of a percentage and then deduct that percentage from the total award of all the items of damages which you make.

Of course, if you have found no contributory negligence, you make no deduction and, of course, if you find that plaintiff was 100 per cent contributorily negligent, you make no award of damage.

If you make an award to the plaintiff, the amount so awarded is not subject to federal or state income taxes and no amount may be added to the award on account of such taxes.

Now, ladies and gentlemen, the most important part of this case is the part which you are now about to play because it is for you and you alone to decide whether the plaintiff has sustained his burden of proof and is therefore entitled to damages and how much the damages shall be.

I know you will try the issues that have been presented to you according to the oath which you have taken as jurors. In that oath you promised that you would well and truly try the issues joined in this case and a true verdict render.

I suggest to you that if you follow that oath

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and try the issues without combining your thinking with any emotions you will arrive at a true and just verdict.

Now, it must be clear to you that once you get into an emotional state and let fear or prejudice or bias or sympathy interfere with your thinking, then you will not arrive at a true and just verdict.

As you deliberate, ladies and gentlemen, please be careful to listen to the opinions of other jurors as well as to ask for an opportunity to express your own views. No one juror holds the center stage in the jury room and no one juror may control or monopolize the deliberations.

If after listening to your fellow jurors and if after stating your own view you become convinced that your view is wrong, do not hesitate because of stubbornness or pride of opinion to change your view.

On the other hand, do not surrender your honest conviction solely because of the opinion of your fellow jurors or because you are outnumbered.

Your verdict in this case must be unanimous and your verdict must be either in favor of the plaintiff or in favor of the defendant.

In order to help you to arrive at your verdict, as I told you earlier, I have prepared a form of verdict which you will take into the jury room with you and it

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consists of a series of questions on three pages. All the questions should be read first before you attempt to answer any question so that you will fully understand what is involved.

Then your answer to each question will be recorded by the foreman of the jury and then when you have reached a unanimous verdict as to each answer, you may then report your verdict to us.

You are instructed that you are not to reveal the standing of the jurors, that is the splitof the vote for any verdict to anyone including the Court at any time if that should occur.

Now, you may send for any exhibits which you desire to see or have any of the testimony which you desire read back.

Now, at this time will the lawyers please approach the bench. We will take it in the robing room.

(In the robing room.)

MR.KLONSKY: Your Honor, I have here two decisions with respect to computing downwards future pain and suffering.

THE COURT: Just state for the record, will you, your objections or exceptions to the charge.

MR. KLONSKY: I except to so much of the charge as relates to the computation downwards of 6 per cent on future

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pain and suffering.

THE COURT: Just enumerate,please. You are not going to read any cases now.

MR. KLONSKY: This was the basis of a prejudicial error and a reversal of an opinion in the Court of Appeals for the 10th Circuit and it is also the basis for an opinion by Judge Friendly in our circuit.

I hand your Honor both decisions which have been handed tome just as your Honor started her charge.

With respect to so much of the charge that spoke of income taxes to be considered by the jury on any award they give the plaintiff, I respectfully submit that that also is prejudicially erroneous and I cite the Second Circuit case of Stokes v. United States at 144 Fed. 2d. 82 and Paul v. Chicago at 9 LAR 2d 320.

Apart from that I have no other exceptions, your Honor.

THE COURT: You may have misunderstood. I told the jury that he would not have to pay income tax on any award.

MR. KLONSKY: He has to pay an attorney's fee. That balances off the income tax. That has been the statement by many judges in this court, your Honor.

THE COURT: Mr. Reid, do youhave any exceptions to

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the charge?

MR. REID: I have no exceptions, your Honor.

MR. KENNY: I do, your Honor.

I except to the charge A, I would like to say that I think I was prejduiced by the fact that there was no rule 20 conference for a ruling on requests to charge submitted by the defendant and third-party defendants. Specifically, your Honor, there was in the charge a statement by the Court that there was an allegation by the plaintiff that the unloading was done in an improper manner. I state that this catches me by surprise. I thought that there were two unseaworthinesss counts, namely, the defective pallet and the unsafe place to work.

I also except respectfully to the charge in that portion which sets forth as an item of damage future lost wages. I say that this is a matter which plaintiff has not met his burden on. There has been no proof that the plaintiff lost any wages from 1969 on and I don't think that this should be an item of damage.

Thirdly, your Honor, I respectfully except to the Court's remark that the plaintiff was prejudiced because of his injury and that he --

THE COURT: Prejudiced?

MR. KENNY: Yes. I respectfully except that there

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is a tight job market.

THE COURT: I was stating the plaintiff's claim.

MR. KENNY: I think that was a claim made on argument. It was never made on the evidence in the case. I submit that in this port, right now that the longshoremen are busier than ever in gross tonnage, the evidence is to the contrary. I think it is something --

THE COURT: You have stated your objection. I was stating the plaintiff's claim and we had this discussion so we would know what his claim was as to future lost wages.

Now, with respect to this Rule 50 matter, we took that up and I pointed out to you what charges I was going to give and I looked over the defendants' charges and they were the same as the plaintiffs on this issue of unseaworthiness and there was no exception then to my not telling you precisely what requests to charge I would make. Moreover, you haven't pointed to any that I should have made.

Mr. Larsen?

MR. LARSEN: I except to your Honor respectfully to that portion of your Honor's charge dealing with the subject of diminution of income where there wasn't any

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proof in the case. Otherwise I have no other exceptions.

MR. KENNY: I would like to see these special questions, what they are.

THE COURT: Youcan see those, too, and I am not going to take any time to change those. There is a copy for each one of you and the record will reflect what they have had before them.

MR. LARSEN: With all deference to your Honor, you did rule on those requests.

THE COURT: Mr. Brady, do yo have any exceptions? Put them on the record.

MR. BRADY: I would adopt the exceptions of Mr. Kenny and Mr. Larsen.

THE COURT: All right, let's return to the jury.

MR. REID: I will reverse myself to the extent on tne future wages, too, your Honor. I will except to that, future wages.

THE COURT: All right.

(In open court.)

THE COURT: Mr. Fox, at this time the Court will excuse you. On behalf of the citizens of the Southern District of New York, this Court thanks you for your service on the jury.

I am sorry that you will not get an opportunity

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MR. KLONSKY: That is right.

THE COURT: All right.

(At 10:20 p.m. the jury announced a verdict.

(In open court, jury present.)

THE COURT: Do you want to proceed, Mr. Clerk?

THE CLERK: Ladies and gentlemen of the jury, please answer as your names are called.

(Roll called; all jurors present.)

THE CLERK: Madam Forelady, has the jury agreed upon a verdict?

THE FORELADY: Yes, it has.

THE CLERK: What is yoyu answer to special question No. 1?

THE FORELADY: Yes.

THE CLERK: Special question No. 2?

THE FORELADY: Yes.

THE CLERK: Special question No. 3?

THE FORELADY: The amount of $4,400.

THE CLERK: 3.2?

THE FORELADY: $2,000.

THE CLERK: 3.3?

THE FORELADY: $23,700.

THE CLERK: 3.4?

THE FORELADY: $27,800.

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THE CLERK: 3.5?

THE FORELADY: $32,300.

THE CLERK: Total of all damages?

THE FORELADY: $90,200.

THE CLERK: Question No. 4?

THE FORELADY: No.

THE COURT: All right, we are going to recess now, ladies and gentlemen, until 11 o'clock tomorrow morning for the jury.

We have additional questions to submit to you on the claims over and there is transportation available for you downstairs that will take you home.

11 o'clock tomorrow morning. Thank you very much.

(Jury left the courtroom.)

THE COURT: We will mark the original interrogatory as Court's Exhibit 2.

(Court's Exhibit2 and 3 were marked.)

THE COURT: Before you go, gentlemen, Just went over the pretrial order and it seems to me that you called out the wrong issue by number with respect to the fourth party complaint. That indemnity relates to the third party defendant, who is the stevedore.

The 10th issue indicates that only the shipowner

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and States Marine claimed indemnity from the fourth party defendant and not the stevedore.

MR. KENNY: Your Honor, in the pretrial order in my statement there is a claim for indemnity against Dole. I don't have it. B, the last page, Exhibit B to the pretrial order.

THE COURT: Yes, I see that you claimed that.

MR. KENNY: Page 2, your Honor.

THE COURT: I saw it, yes.

For some reason your name was omitted from issue 10, but I gather it was intended to be included since it was one of your contentions.

Thank you, gentlemen. Tomorrow at 10:30.

MR. KENNY: What about motions, your Honor?

THE COURT: With respect to this verdict, we will have to take those in the morning.

(Adjourned to June 6, 1975, at 10:30 a.m.)

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that position throughout the trial and I adhere to that position now because I firmly believe that the evidence shows that this was not an improper stowage.

THE COURT: Let me see if I understand you now. You are not claiming improper stowage?

MR. REID: Not against the time charterer.

THE COURT: All right. That leaves the question of supervision, does it not?

MR. REID: Yes, it does. Supervision and proper discharge.

THE COURT: Yes, supervising the discharge, I should say. That is the next issue, supervision of discharge.

What do you claim the time charterer failed to do?

MR. REID: In the unloading operation, your Honor, I will have to make the same claims that the plaintiff made against me, namely, that the method of the performance of the work was such that they did not give a safe shelter to the plaintiff.

THE COURT: I see. In other words, encompassing in that are these three claims then.

MR. REID: Yes, the same ones which I make against the stevedore.

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MR. LARSEN: May I say, your Honor --

THE COURT: So that it seems to me that we may have to send to the jury the question of whether the time charterer's failure to supervise the stevedore was such as to preclude the time charterer's recovery offer against the stevedore.

The same would be the case as to the shipowner's claim against the stevedore for indemnity. In a claim by a shipowner against the stevedore it must not appear that the shipowner's involvement in the unseaworthy condition was such as to preclude indemnity. It seems to me the same principle would apply to the time charterer.

MR. LARSEN: May I be heard, your Honor?

THE COURT: Just a moment.

In other words, since the time charterer seeks indemnity against the stevedore and since the time charterer had the primary responsibility for the loading and the unloading, if there was any unseaworthy condition or dangerous condition, the stevedore had the duty to notify the time charterer or the captain of the vessel so that the condition could be corrected. The stevedore had a duty to stop work until the dangerous condition was corrected. So that as to any such dangerous condition or unseaworthy condition, it must appear that the shipowner by the

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captain or the charterer knew or should have known of the condition. If they knew of the unsafe working area, the question would be whether they acquiesced in it and, if they acquiesced in it and failed to change the condition or remedy the condition, then they would be precluded from recovering indemnity from the stevedore.

The jury would have to be instructed that they must find that that failure to act or failure to remedy a condition on the part of the shipowner or the charterer was such as to outweigh the breach of the stevedore's duty.

So that I think we have to send additional questions to the jury on that issue.

I will hear from you, Mr. Reid, if you want to speak on that.

Then Mr. Larsen and then Mr. Kenny.

MR. REID: On that last issue, your Honor, I don't think there is any evidence to point in any way to the shipowner of any act or inactivity which would preclude it from indemnity. I call the Court's attention to a case, I don't have the citation, but I have an opinion. That is an opinion I wrote here some time ago. It is the decision of the Second Circuit on September 12, 1974. It is called Hudrich versus Eastmount Shipping Corporation. On page 5416 of the slip opinion.

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the issuance of the bills of lading, but they are the time charterer's bills of lading and he is the primary carrier. That is the reason why Dole didn't make any claim against us for cargo. They went after the carrier under the bill of lading.

THE COURT: I see.

MR. LARSEN: The documents --

THE COURT: They went after the charterer under the bill of lading?

MR. REID: Yes, because they were the named carrier.

MR. LARSEN: The documents are the documents of both the shipowner and the charterer, your Honor.

THE COURT: What I am getting at finally, Mr. Reid, is whether there is anything to go to the jury at all regarding your claim against the time charterer. What we are sending to the jury is the time charterer's claim against the stevedor for indemnity.

Now, is there any necessity to send your case against the time charterer for indemnity?

MR. REID: If it can be agreed that the time charterer is liable for the same acts that the stevedore committed in the discharge operation, meaning improper supervision, that is one thing, and failure to stop work

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when a dangerous condition was known. I say that the time charterer and the stevedore, they are standing in the shoes of one another but with a right of indemnity by the time charterer against the stevedore.

THE COURT: Yes. Then, of course, if the stevedore is found liable to the time charterer, the time charterer was automatically liable to you, isn't that so?

MR. REID: I would think so, your Honor.

MR. LARSEN: Not automatically, your Honor. I think Mr. Reid would agree that he has to show by the evidence a breach of duty.

THE COURT: On your part.

MR. LARSEN: In negligence, your Honor. Mr. Reid in the requests to charge from Chios against me says Chios, third party plaintiff, claims on a finding of negligence of States in failing to properly load, stow and discharge an indemnity from me and there has been no proof of that and it is improper to give that issue to the jury, as I have maintained all along.

THE COURT: What issue?

MR. LARSEN: You referred to it as supervision, your Honor. What did I do neglectfully with respect to my relationship --

THE COURT: We are going to find out by these

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questions. I went over that. These questions to the jury are going to say with respect to your claim against the stevedore. We have gone over that, haven't we? You can't make a claim over against the stevedore without showing that you didn't do something which prevented the stevedore, isn't that so?

MR. LARSEN: That is correct.

THE COURT: That you were not at fault which outweighed his fault. I am saying that is going to the jury.

MR. LARSEN: That is correct, because at this point I haven't been held responsible to anybody. That is correct, your Honor.

THE COURT: We are talking now about what is going to the jury.

MR. LARSEN: With respect to Mr. Reid, I say there is an issue between us as to whether I was guilty in negligence.

THE COURT: That will be shown if the jury finds that you were, wouldn't it? What question do you suggest goes to the jury on that?

MR. LARSEN: I would submit that between Mr. Reid and myself the jury ought to determine, based upon your denial of my motion for a directed verdict, the facts go to the jury as to whether or not under the

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evidence I did in fact breach any of my duties allegedly owed to Mr. Reid. Did I fail to properly load, stow and trim the vessel and discharge the vessel under the facts of this case. I think that has to go to the jury.

THE COURT: I just said it would for the 15th time.

What we will do is recess for a half hour so that you can get a cup of coffee and then we will begin the summations to the jury on this issue.

Bear in mind that each of you has a claim over against the Dole group so that Mr. Brady, you probably should start first.

MR. BRADY: Yes, your Honor. Of course I have claims over against them. I have claims for indemnity against each of these parties also and I trust your Honor will charge that.

THE COURT: What are those claims?

MR. BRADY: Your Honor, those claims are based upon the failure to provide a seaworthy ship, a failure to load and unload in a safe and proper manner and lack of supervision.

I have the same claims against them.

THE COURT: That is going to be determined by the questions now, isn't it?

MR. BRADY: Yes, your Honor. Do I understand

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gentlemen, the time allotted would be 20 minutes for each side on this claim over business.

MR. REID: May I have five or ten minutes longer, your Honor, since I have a claim over against three people.

MR. KENNY: I could say since three people have claims over against me, I should take five or ten minutes more, too.

MR. REID: I am the last to talk and I have to answer three arguments here.

MR. BRADY: I think each of us should have the same time.

MR. REID: I am primarily liable to the plaintiff.

MR. KENNY: I will go last and I will take 20. Do you want to switch with me?

MR. REID: No.

MR. KENNY: I think you speak with forked tongue. I say that as a friend of Mr. Reid's and respectfully, your Honor. I know him very well and I respect him.

THE COURT: Let's not have any disrespectful comments even from friends.

I think, Mr. Reid, that we concluded that what we would be sending to the jury was the charterer's claim over against the stevedore, have we not?

MR. REID: Yes.

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THE COURT: Because he was primarily liable for the discharge, as we have said, and he would be liable to you as a matter of law.

MR. REID: Yes.

MR. LARSEN: I take exception to your Honor's ruling.

THE COURT: If he recovers against the stevedore. If the stevedore is found at fault, he recovers against the stevedore, he is liable to you as a matter of law I would think.

MR. LARSEN: I take exception to your Honor's ruling.

THE COURT: That is taken care of. You said that 15 times, Mr. Larsen. So I don't know, you can argue that part of it, the stevedore's liability, the stevedore is at fault here. You can argue that Dole was at fault and you can.

I guess you would also be arguing that the time charterer was at fault because he failed to supervise and had the primary responsibility.

MR. REID: Yes.

THE COURT: So then I guess we would be presenting your case against him, isn't that so?

MR. REID: Yes.

* * *

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or less as an introductory statement to the questions of law involved.

THE COURT: The same with respect to your requests to charge, Mr. Larsen, over against the shipowners.

One is just a statement of fact and the rest of it is an incomplete statement of law or incorrect statement.

Number 1 is rejected, let's put it that way. They know that you had a time charter so I don't need to tell them that.

As to 2, that is a question of law and I have ruled to the contrary on that. That is something that doesn't have to go to the jury. I won't give them that.

In any event, I have ruled to the contrary on 2 and 3. 4 is the same. 5 the same.

6 is accepted. You are not responsible for any latent defect in the pallet.

MR. KENNY: Who is that, your Honor?

THE COURT: States Lines is not responsible for any latent defect in the pallet to the shipowner.

MR. KENNY: Excuse me, your Honor, I misunderstood.

THE COURT: You gentlemen have to listen carefully. I have repeated things often enough here because people are not listening.

MR. LARSEN: I withdraw Number 7, your Honor.

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With respect to number 8, could I ask before the Court rules on number 8 to add "discharge" after the word "trim".

THE COURT: Just a minute.

Yes, we can add "discharge" and then 8 is applicable.

MR. LARSEN: I am sorry, I didn't hear your Honor on number 8.

THE COURT: We are adding "discharge." The last sentence of 8 is gratuitous. There is no proof that you negligently discharged so we will charge that the jury would have to find that you did something negligent, like failing to supervise.

MR. LARSEN: You will charge number 8 in essence, your Honor?

THE COURT: Yes.

MR. LARSEN: All right.

THE COURT: 9 is a repetition of something we had earlier.

MR. LARSEN: I withdraw that, your Honor.

THE COURT: You are not responsible for any hidden defects in the manufacture.

MR. LARSEN: Withdrawn, your Honor.

THE COURT: So that we are putting questions [illegible]

* * *

CHARGE OF THE COURT

(In open court, jury present.)

THE CLERK: The Court is about to charge the jury. Any spectator wishing to leave the courtroom will do so now or remain seated until the completion of the Court's charge.

Marshal, please lock the door.

THE COURT: Ladies and gentlemen, as you know I have previously instructed you concerning the burden of proof which a plaintiff has in a civil action of this kind. Now, that instruction applies to the claims which have been brought for indemnity against the stevedoring company, which unloaded the ship, and against the Cook, Castle, Dole group by those who claim indemnity against those parties.

I have also instructed you on how you are to determine the credibility of witnesses and how you are to determine the weight which you accord that testimony.

I have also previously instructed you on the meaning of proximate cause.

I have instructed you on how to deliberate and I have previously charged you that your answer to any particulare question must be a unanimous answer.

In connection with these claims over, as I told you earlier, you will be answering questions.

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Now, all of those instructions which I gave you yesterday are applicable to the claims made here at this time, as I have just indicated.

I am now going to discuss with you the claims of the shipowner and the States Marine Lines and the Dole group against the Maher Stevedoring Company.

Now, I want to point out, as I did earlier, that since you have returned a verdict in favor of the plaintiff against the shipowner on the ground that the vessel was unseaworthy, the shipowner has brought an action for indemnity against the stevedore.

Now, as you know, the States Marine Lines chartered this boat or a portion of it to ship this goods because that is its business, to ship goods for others. In connection with that it had agreement with the ship to stow and trim and discharge the cargo and pursuant to that agreement it hired the stevedore.

Now, under the law that charterer, that is States Marine Lines, has the primary responsibility for the loading and unloading. That is because it hires the stevedoring company and it pays the stevedore because what it is doing is shipping goods. It is only renting space in the ship so the law casts upon the charterer the primary responsibility because the ship is also responsible

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if goods are damaged or if somebody is injured.

So both of them are claiming indemnity from the stevedore and, of course, the Dole group claims that the stevedore was responsible for this accident.

Now, these claimants say that the stevedore breached its warranty of workmanlike performance by failing to properly supervise and direct its employees with respect to the unloading operation and by failing to provide for the safety of its employees.

They next claim that Maher, the stevedore, did not comply with an applicable safety regulation regarding the unloading of goods by means of pallets. They make this claim because the stevedoring company was engaged to unload the vessel.

As you know, the goods were pre=palletized.

Now, I instruct you that the law is that a stevedoring company by undertaking to unload a ship warrants to the shipowner, as well as to the charterer who hires him, that it will perform its stevedoring duties in a workmanlike fashion and with reasonable safety to persons and property.

In other words, the stevedoring company agreed that it would perform its task in a careful, prudent and efficient manner. There was no duty on the shipowner to continuously supervise the work of the stevedore.

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The stevedore furnished the labor and materials and supervision of its own men.

If the stevedoring company failed in its obligation to do its job in a workmanlike manner and as a result the plaintiff, a longshoreman, was injured, then the shipowner is entitled to reimbursement from the stevedoring company for whatever amount the plaintiff recovered.

If the area where the longshoremen were required to work was not suitable because of insufficent space in which to maneuver equipment or if the loading of the pallet was being performed in an unsafe manner in that proper pallets were not being used and if the stevedoring company had actual knowledge through its employees of these facts or should have known of these facts in the exercise of its duty to perform in a workmanlike manner, then the stevedoring company had the duty to give the plaintiff reasonable warning of such danger and to stop unloading the ship until these conditions were remendied, but I want to point out that the stevedoring company is not charged with knowledge of defects which reasonable visual inspection would not have disclosed.

The stevedore had only a duty to conduct a cursory inspection of the area where the work was to be done and the cargo. It hadno duty to conduct an inspection

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of each and every aspect of the ship and each and every aspect of the cargo to be unloaded.

If the only proximate cause of the injury to plaintiff in your view was a latent defect in the pallet in question, then you must find in favor of the stevedore because, as I have said, the stevedore is liable only for obvious defects which reasonable inspection or even a cursory inspection would have disclosed. It has no duty to examine everything in detail to make sure there is no latent defect.

Now, as I have said, in their claims against the stevedoring company the shipowner and these other parties have the burden of establishing that claim by a fair preponderance of the credible evidence. Thus, even though you have found in favor of the plaintiff in an action against the shipowner, you may not find in favor of the shipowner against the stevedoring company unless you find by a fair preponderance of the evidence that the plaintiff met with his accident because of the failure of the stevedoring company to perform its job of providing a place for plaintiff to get out of the way or failed in its duty of properly unloading the pallet from the ship in a workmanlike manner and with reasonable safety to persons and property.

If the shipowner or these parties have sustained

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this burden of proof, then, as I said, the parties are entitled to recover against the stevedoring company.

Now, in connection with the claims for indemnity against the stevedore, I point out further that the law does not require perfection in ths performance of stevedoring service. If you should find that the stevedore performed its work in a reasonable workmanlike manner, then the claimants here are not entitled to indemnity against the stevedore.

Even if you should find that the stevedore did not perform its owrk in a reasonable and proper manner, the sthipowner is not entitled to recover indemnity if its own conduct was sufficient to preclude such recovery.

Now, in this case it applies to the charterer, the statement applies to the time charterer who had the primary responsibility for the unloading of the ship. Now, in this case, as I have said, the charterer employed the stevedore, paid him, but the ship's crew was actually there, the ship's captain was there and, as I have said, since the shipowner has been held liable to the plaintiff, he is looking for indemnity from the charterer or the stevedore and the charterer is also suing the stevedore so you have to bear that in mind when I refer to the shipowner being entitled to indemnity because they are

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really in the same position with respect to their claim agsint the stevedore.

You must therefore consider the acts and omissions to act on the part of the shipowner, its agents, servants and/or employees to determine whether such acts or omissions to act were sufficient to preclude a recovery on their part against the stevedore.

However, only the shipowner's acts or omissions which prevented or hindered the stevedore from performing its services as the shipowner claims it should have performed and the shipowner is not entitled to recover indemnity from the stevedore. If you find that that was the situation here, that either the ship's captain or somebody else interfered with the stevedore when he was trying to carry out his work and prevented him somehow from performing in a workmanlike manner. Only then would the shipowner be barred from recovering from the stevedore.

In addition, the shipowner would be barred from recovery if you find that something the shipowner's employees did so outweighed the stevedore's failure as to bar recovery on the part of the shipowner.

So before you could find that the shipowner is barred because of his own action, you have to find that the shipowner's agents either prevented the stevedore from

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doing something or did something on its own which far outweighed the failure of the stevedore to perform its duty in a workmanlike manner.

Now, you must also take into account whether the shipowner or its agents knew or should have known of the conditions under which the longshoremen would be working. If it new or should have known and did not object and if it acquiesced in the longshoremen working under such conditions, it is not entitled to recovery indemnity

In other words, if in weighing the evidence here you should find that the shipowner's fault or breach of duty again far outweighed the stevedore's fault or breach of duty, then you may find that the shipowner is not entitled to indemnity.

Where a stevedore has knowledge of a dangerous condition, he must remedy the condition or have the ship do so and he must discontinue work until that dangerous condition is remedied.

A stevedoring company which undertakes to perform work aboard ship, as I said before, warrants that its duties will be carried out in a workmanlike manner.

The shipowner is entitled to indemnity for any damages sustained by the stevedore's failure to do its

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work properly. Where the hazard is created by the negligence of the shipowner or otherwise, the stevedore firm is liable if a workmanlike performance would have eliminated the risk of injury.

Now, the stevedore under its implied agreement to perform in a workmanlike manner and also pursuant to the safety and health regulations for longshoring issued under the Longshoremen and Harbor Workers Compensation Act and which were in force at the time of the plaintiff's injury, the longshoremen had a duty with regard to the general working conditions aboard the vessel.

These regulations define how the plaintiff's employer, the stevedore, shall discharge its duties when it has undertaken to perform for the shipowner.

Now, one regulation provides that the responsibility for compliance with the regulations is placed on the employer, in this case the stevedore. The term "employer" is defined to mean an employer whose employees are employed in whole or in part in longshoring operations or related employment.

When the stevedore is the employer, these regulations provide certain standards with respect to the pallets and I am going to read that to you. One of the lawyers read it to you earlier.

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It says first: "Pallets shall be of such material and consutruction and so maintained as to safely support and carry loads being handled on them. Fastenings of reusable pallets shall be bolts and nuts, drive screws (helically threaded nails), anular threaded nails or fastenings of equivalent strength."

Then in the next section it says, "Wing or lip type pallets hoisted by means of bar bridles shall have an overhanging wing or lip at least three inches long."

The next section reads:

"Loaded pallets which on visual examination do not meet the requirements of this section shall be placed on pallets meeting the requirements before being hoisted into or out of the vessel."

The final section provides:

"Bridles used to handle flush end or box type pallets shall be of such a design as to prevent them from becoming disengaged from the pallet under load."

Again, the stevedore represents that he is an expert and experienced in the work of loading and unloading vessels. The individual longshoreman may or may not be an expert. It is also to be expected that a longshoreman may find conditions on the vessel which may be considered unsafe by reasonable inspection on his part. As a rule,

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the stevedore can remedy the condition at the expense of the shipowner, he must pay for the delay in stevedoring operations while the condition is corrected. Where the stevedore fails to correct an unseaworthy condition and continues to work, the shipowner is entitled to indemnity.

Finally, where a stevedore has knowledge of the dangerous condition, as I said before, he must remedy it and the ship do so or stop work. Notifying the vessel of the defect is not sufficient. The stevedore must cease operations where the condition has not been remedied and either remedy it himself or have the vessel do so or stop work.

Now, we come to the claims of the shipowner, the charterer and the stevedore against the shipper of these goods, that is, the Castle, Cook, Dole group that packaged the goods and pre-palletized them. Each of them as you know claims that this accident occurred as a result of that pallet breaking and coming apart.

Now, I will refer throughout this charge to the Castle, Cook, Dole group as the Dole group just to shorten the reference.

The Dole group admitted that at and before the time of loading it undertook to provide a safe, seaworthy and proper pre-palletized package of cartons of pineapple.

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They admit that they manufactured it. That is not in dispute.

Now, the law implies a warranty by a manufacturer who places his product on the market that it is reasonbly fit for the purpose for which it was intended. If it is in fact defective and not reasonably fit to be used for its intended purpose, then the manufacturer breaches this warranty.

Now, each of these claimants says that Castle's palletized package was not fit for its intended purpose for shipment, transportation, handling and discharge aboard ocean-going vessels because the palletized package broke, it came apart, it spilled the cartons of pineapple stacked on it.

If you find that the palletized package in fact was defective and not fit for its ordinary purpose, you will find that the Dole group breached its implied warranty.

In such case you will return an answer appropriate as set forth on this questionnaire.

But in addition you have to find all of the following things in answering this question regarding the package.

First, that at the time of the occurrence the

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pallet was being used for the purpose for which it was intended.

Second, that this particular danger could not have been discovered in the exercise of reasonable care.

Finally, that the breach of warranty was a substantial factor in the bringing about of the injury to the plaintiff.

The Dole group, as the manufacturer of this pallet, which is reasonably certain to be dangerous if defective, owed a duty to exercise reasonable care to prospective users in the manufacture of its product so that it would be reasonably safe for normal stowage, transportation, handling, lifting and discharge.

Now, "reasonable care" means that degree of care which a reasonably prudent manufacturer of such a product would have exercised in the making, inspecting and testing of the product and the material and the parts of which it is made in order to put out a reasonably safe product.

Now, if you find that this palletized package, which plaintiff claims injured him, was defective when shipped by Dole and that with such a defect the palletized package was reasonably certain to be dangerous when put to its expected use and you further find that Dole failed to

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exercise reasonable care in making the package or in inspecting and testing it for defects or that though Dole exercised reasonable care in making, inspecting and testing the palletized package, Dole learned before it shipped the package of the defect, your finding will be that Dole was negligent.

Now, in determining whether or not the palletized package was defective when shipped, you may look at what we call the circumstantial evidence in the case. In other words, this determination may be made by proof of the circumstances especially here where the cartons of pineapple rested upon the deck of the ship and were covered with respect to a top view by other goods and merchandise and by the pineapple cartons themselves resting on the pallet.

So, I want to tell you, then, a word about circumstantial evidence. Circumstantial evidence may be sufficent to sustain a finding of negligence, as I have said. Circumstantial evidence is different from another class of evidence that we have in cases. It is different from what we call direct evidence.

As you can probably guess, direct evidence tends to show the fact in issue without need for any other amplification, although, of course, there is always the

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question of whether that evidence is to be believed.

Circumstantial evidence, on the other hand, tends to show facts from which the jury may infer by the process of reasoning the disputed fact in issue.

In other words, it is that evidence which tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer that the facts sought to be established are true.

Now, I will give you a simple example of what we mean by circumstantial evidence. Sometimes when you are in a tall building, such as this, if you go over to the window and you look out you can't always tell whether or not it is raining outside. But if you go over to the window and look down into the street below and you see people passing by with their umbrellas up, then you may come to the conclusion that it is raining.

In that situation you have the evidence of your own senses that the umbrellas are up and that constitutes circumstantial evidence from which you may conclude that it is raining without having any actual proof or direct proof that it is raining.

Now, in determining whether the Dole group was negligent you should consider if the accident was caused by a defect in the pallet and whether the defect was of

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the type which would not ordinarily occur in the absence of negligence on the part of the manufacturer.

Now, it is important to note that the precise defect need not be named or proved. It is enough if the accumulation of circumstances and inferences, including the happening of the accident, make it more probable than not that there was a defect that caused the accident. Though the happening of the accident itself is not proof of a defect of a condition, a defect may be inferred from proof that the product did not perform as intended.

Again, it is not necessary that the defect was apparent or obvious at the time the pallet left the Dole group's possession. It may be a latent or non-obvious defect or hidden defect which later arises and causes damage.

Again in this connection the law requires that the Dole group produce a palletized package that will not break or collapse when lifted, a purpose for which it was intended, and that the palletized package be free from hidden defects or concealed dangers.

Now, in the manufacture and assembly of this pallet the Dole group used wood which it purchased from a lumber company and, therefore, it was under a duty to make inspections and tests of the wood as a reasonably

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careful manufacturer and assembler in this kind of business should recognize as necessary to secure a finished product reasonably safe for its intended use, that is, stowage, handling and lifting.

Castle or Dole was under a duty to inspect, even though the wood was obtained from a reputable lumber yard. The failure to make reasonable inspection and the failure to exercise reasonable care in the making of the product, the failure to make tests is negligence.

Dole, as the manufacturer and assembler of the pallet, was expected to possess the skill and knowledge of an expert in its field.

Now, the manufacturer of a product which is reasonably certain to be dangerous if used in a way which he should reasonably foresee it would be used is under a duty to exercise reasonable, to give reasonable and adequate warning of any dangers known to the manufacturer or which in the exercise of reasonable care he should have known and which the user of the product ordinarily would not discover. Reasonable care again means that degree of care which a reasonably prudent manufacturer would exercise under the same circumstances.

Again, the Dole group admits that it manufactured the pallet and admits that it had a duty at the time that

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it made it to produce a safe pallet and, therefore, before these claimants can recover, you must find that they have established three essential elements.

First. At the time the pallet was designed and delivered it was in a defective condition and dangerous to the plaintiff and those working in the hold of a vessel.

You must also find that the pallet was expected to and did reach the vessel without substantial change in the condition in which Dole delivered it to the ship.

Finally, you must find that the defective condition in the pallet proximately caused injury to the plaintiff.

Now, if you find that the essential elements that I have just enumerated have been established by a fair preponderance of the credible evidence, then Dole is liable even though you may find and believe that Dole exercised all possible care in the preparation, sale and delivery of the pallet.

Now, in addition to the general principles of law which I have just announced, there is a federal statute known as the Carriage of Goods By Sea Act, which gives a shipowner a statutory cause of action against a shipper in negligence. In this case the charterer issued to the shipper, the Dole group, its bills of lading signed by the ship's master. This made the shipment subject to this

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federal statute.

Under this statute the shipowner was also made a carrier and, therefore, the shipowner does have, quite aside from the other principles, as I have said, a right to bring this action. So that the shipowner has in addition to these legal principles a federal statute under which it provides.

Again, you must find that the manufacturer of this product was negligent.

Now, as I told you before, I have these questions set out here and again I want to instruct you that you should read all the questions first and make sure you understand all the questions in their relationship to each other before you undertake to answer any single question.

Again, I instruct you that your answer to a particular question must be unanimous.

So you may take these questions into the jury room. Would you hand this to the foreman, please.

The jurors may now go into the jury room with the marshal, the marshal having previously been sworn.

(Jury retired to deliberate at 5:50 p.m.)

THE COURT: I have copies here of the questions for you, gentlemen.

Would you tell the marshals to make arrangements

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to take the jurors to dinner at 7:00 o'clock.

MR. BRADY: Your Honor, will your Honor take exceptions to the charge now?

THE COURT: Yes, why don't we do that.

No, we will take them after dinner. You may note them on the record.

The motions we will take in writing.

MR. KLONSKY: In other words, the motions for the verdict will be deferred.

THE COURT: Written out and supported by authorities.

MR. KLONSKY: You mean motions by defendants on the verdict for the plaintiff?

THE COURT: Yes.

MR.KLONSKY: That will be ten days from now?

THE COURT: Yes.

MR. KLONSKY: There is no need for me to stay then, is there?

THE COURT: I don't think so.

MR. KLONSKY: Thank you.

MR. REID: Your Honor, may we place them on the record now.

THE COURT: The exceptions?

MR. BRADY: The motions relating to Mr. Klonsky.

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THE COURT: No, that is going to be written out. It has to be written out.

MR. KLONSKY: In ten days, your Honor.

THE COURT: That's right, in ten days you write out those motions. As I indicate, I am going out to dinner now, but I will leave a number where I can be reached. I will be back.

(Dinner recess.)

(8:50 p.m.)

(In open court without the presence of the jury.)

THE COURT: The jury requests safety regulations with respect to unloading of pallet and they have gotten that. I think we sent that in.

Mark this as Court's Exhibit No. 4.

(Court's Exhibit 4 marked for identification.)

THE COURT: The latest note reads:

"Jury requests Court's definition of proximate cause."

That is A.

"B. Can there be more than one proximate cause."

The answer to that is, "Yes," and I will reread the definition of proximate cause.

Bring in the jury.

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(Jury present.)

THE COURT: Ladies and gentlemen, I have your second note which reads:

"A. Jury requests Court's definition of proximate cause."

"B. Can there be more than one proximate case?"

The answer to the second question first, the answer to that is yes, there can be more than one proximate cause.

Now, I will reread the definition of proximate cause.

Proximate cause means that there must be a direct causal connection between any negligence on the part of the Dole group or any breach of warranty on the part of the stevedore and the plaintiff's injuries.

To constitute proximate cause that particular cause must actually contribute to the result.

Therefore, each claimant in this case must prove by a fair preponderance of the credible evidence that the injuries and damages which the plaintiff sustained were proximately caused in whole or in part by the negligence of the Dole group or the stevedore's breach of warranty.

I think that is about as much as would be applicable to this situation.

If there is anything further you can let us know.

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You may return to the jury room.

(Jury reretired to deliberate further at9:00 p.m.)

(Court's Exhibit 5 marked for identification.)

MR. LARSEN: Your Honor, may we be heard with respect to the exceptions on your charge to the jury?

THE COURT: All right.

MR. LARSEN: I think we ought to proceed in some sort of orde..

THE COURT: Mr. Brady, do you have any exceptions to the charge given by the Court with respect to the stevedore's duty and your client's duty.

MR. BRADY: Not with respect to the stevedore's duty, but with respect to my client, I except to that portion of your Honor's charge relating to implied warranty and the three definitions.

THE COURT: Will you speak up so I can hear you.

MR. BRADY: Yes, your Honor. I except to that portion of your Honor's charge relating to implied warranty that a product must be reasonably fit for the purpose intended. That portion of the charge which gave three findings as the occurrence of the pallet being used for the purpose intended; that a danger was undiscernible

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in the exercise of reasonable care and that a breach of warranty was a substantial factor in causing injury to the plaintiff.

I would except to the portion of the charge concerning negligence where it may be latent or hidden defect and free from hidden defects and to the other three elements which your Honor detected, defective when delivered, reached vessel without change and defendant's condition caused injury to plaintiff and I would except to your Honor --

THE COURT: It would be easier just to except to every portion of the charge than to sit there and read it.

Take exception to every portion of the charge relating to your client.

Do you have any exceptions, Mr. Kenny?

MR. KENNY: Your Honor, I respectfully except to that portion of the charge which recited the stevedore's duties under the longshoring regulations.

Your Honor, I also respectfully object to the questions propounded to the jury in that they do not leave, as did the interrogatories propounded on the plaintiff's case against the vessel, the alternative that the jury can find that the shipowner, who is in the same place as the plaintiff, as your Honor pointed out with regard

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to the burden of proof, can fail in his burden of proof. This is not left.

Such an alternative is not given to the jury with the questions they now have before them.

I also must --

THE COURT: I don't understand that. Each question says has the plaintiff sustained its burden. What do you say?

MR. KENNY: Your Honor, it is my opinion, and I say this respectfully for the Court, that just as compared to the interrogatories propounded to the jury by the Court on the plaintiff's direct case against the seaman, these interrogatories that the jury has now had before them since before 6:00 o'clock are prejudicial to my client in that they do not set forth the alternative --

THE COURT: What alternative?

MR. KENNY: To find that the shipowner has not borne his burden that any of the third party defendants have breached any duty to him and, therefore, the third party claims all should fail.

THE COURT: I don't begin to understand that. You mean we should have framed the question that you think should have been there so I can understand it.

MR. KENNY: I am looking at the last page of

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the interrogatories propounded to the jury on plaintiff's case against the shipowner Chios.

I think we should have gotten the same type of note on the interrogatories propounded on the shipowner's third party claim. I think the jury could have possibly been under the impression that they have to find that somebody breached its duty to the shipowner.

THE COURT: All right. The charge, I am sure, made it clear that they would have to find that plaintiff carried his burden of proof and that the shipowner could do something to defeat his recovery on indemnity.

MR. KENNY: Your Honor, I also, I say this most respectfully to the Court, I must object that here at five after 9:00 we are now given opportunity to except to the Court's charges. I think it should have been done, I say this most respectfully, your Honor --

THE COURT: It should have been done when?

MR. KENNY: I think it should have been done before the jury retired with the charge.

THE COURT: We spent how many hours this morning on this matter of developing these questions and the charges. I had no intention of charging the jury any further. We spent from 11:00 o'clock this morning, it was before 11:00 I think we started, certainly at least 11:00 o'clock until 2:00 o'clock. We spent time last night. I don't know

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how many hours last night pounding out these problems so that even if you had excepted, I had no intention of charging the jury further, not after spending five or six hours with the lawyers trying to iron this out.

You knew what I was going to charge and you have made your exceptions.

MR. KENNY: Your Honor, I say this most respectfully, your Honor, I have to do my job. What upsets me most is this interrogatory. I don't think it leaves the jury with the impression, this is my -- these are my thoughts, your Honor --

THE COURT: It is too late now. You have to rely on the charge and you have an exception to every portion of the charge.

Do you have any exceptions?

MR. LARSEN: Yes, Judge Motley, on behalf of States Marine Lines it excepts to those portions of your Honor's charge which recited that States Marine Lines had the primary responsibility with respect to the discharging of the S.S. Chios and, secondly and lastly, States Marine Lines excepts to that portion of your charge where you stated to the jury that the acquiescence of the shipowner to the stevedore's acts or conduct may bar indemnity.

That is all I have.

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THE COURT: All right. Do you have any, Mr. Reid?

MR. REID: Just the last that Mr. Larsen mentioned, your Honor, and just for the record on No. 5 --

THE COURT: Question No. 5?

MR. REID: Yes, please, where it refers to the captain or any member of the crew, or the ship's crew knew or should have known of the condition. I don't think that there was any evidence in the case at all that the captain or the crew knew what was going on. They weren't around. There is no evidence they were around. There is no evidence that they knew that an accident occurred. The accident was never reported to them.

In connection with the curther charge that your Honor just gave to the jury on proximate cause, your Honor mentioned on the question of negligence of the Dole group and we had claimed in addition to negligence our strict liability in tort and breach of warranty and also under the Carriage of Goods by Sea Act.

I think a violation of the other three counts of Chios against the Dole group could be concurrent causes and a proximate cause as well as negligence.

THE COURT: What could be, I didn't get the first part of that?

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MR. REID: That the other three counts of the violation of the Carriage of Goods by Sea Act and strict liability in tort and breach of warranty could also be concurrent causes or concurrent proximate causes as well as negligence on behalf of the Dole group.

THE COURT: Well, the Carriage of Goods by Sea Act requires a finding negligence, doesn't it, by the ship?

MR. REID: Yes, your Honor --

THE COURT: And these other claims are a kind of species of negligence in the sense that an implied warranty, you remember the discussion that we had of this, the distinction between implied warranty and strict liability.

MR. REID: Right.

THE COURT: Implied warranty is kind of the same thing, a species of negligence.

I think what the jury is really concerned about was hearing that definition again of direct causal connection and whether there could be more than one proximate cause.

MR. REID: Yes, I understand that.

THE COURT: And you will note that I said in the questions, question 4, if the answer to any of questions 1, 2 or 3 is "Yes" and these parties have sustained their

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burden of proving that the stevedore's action was a proximate cause of plaintiff's injuries.

The same in question 10 with respect to the Dole group, a proximate cause, not the proximate cause.

MR. REID: I just wanted to --

THE COURT: So it is clear that there could be more than one proximate cause by the question itself. That isprobably why they asked it and I think they just wanted to make sure of that.

MR. KENNY: Your Honor, could we have marked as a Court's Exhibit those notes. They have been marked?

THE COURT: They are automatically marked.

Again you are not listening, I called the clerk twice and told him to make the exhibits. They are always marked as Court's Exhibit, the notes from the jury.

All right, anything further?

MR. KENNY: Motions, your Honor?

THE COURT: Those are going to have to be written out. Motions at the end of the plaintiff's case. We are not at the end of the other case yet.

MR. KENNY: There was one motion, your Honor, which was left outstanding, the motion that all parties made for a directed verdict against the third party defendant Dole group.

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THE COURT: I thought I denied that yesterday. That is why it has gone to the jury.

MR.LARSEN: I presume there was a denial of that motion. That is why I didn't make it.

THE COURT: That is why we have these questions as to whether the pallet came apart as a result of the fork going in or the bridle not being attached --

MR. KENNY: I haven't made a motion for a directed verdict after the jury's findings of yesterday. I would like to make a motion for a directed verdict --

THE COURT: No, those motions after the jury's verdict yesterday are going to have to be written out. They are not just a motion for a directed verdict.

You are going to have to have some reason for it and moreover you are going to have to have some cases for a change. I am not even going to consider it so when you make that motion, unless you support it with a brief, it is going to be denied. I told the plaintiff that when he left and you were here and we are again going over something I have already gone over.

MR. KENNY: Your Honor, in defense of the lawyers, you know, I have been upstairs and they say to me, well, you didn't make the record.

THE COURT: They said what?

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MR. KENNY: You go upstairs and they say you don't make a record and that is why we are extra careful.

THE COURT: Here we have made the record at least five times. Everything has been gone over. The record will show at least five times and we have spent six hours on the legal questions in this tangled case.

All right.

(Recess.)

(9:25 p.m. the jury announced a verdict.)

(In open court, jury present.)

THE CLERK: Ladies and gentlemen of the jury, please answer as your names are called.

(Roll called, all present.)

(Colloquy between Clerk and Forelady.)

Q Madam Forelady, has the jury agreed upon a verdict?

A Yes, it is.

Q What is your answer to special question No. 1?

A Yes.

Q Question No. 2?

A No.

Q Question No. 3?

A No.

Q Question No. 4?

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A Yes.

Q No. 5?

A No.

Q 6 and 7 nothing.

No. 8?

A Yes.

Q No. 9?

A Yes.

Q No. 10?

A Yes.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded:

No. 1, yes; No. 2, no; No. 3, no; No. 4, yes; No. 5, no; 6 no answer, 7 no answer.

8, yes; 9, yes; 10, yes; and so say you all.

THE COURT: All right, thank you very much, ladies and gentlemen.

MR. KENNY: Your Honor, I would like the jury polled, please.

THE COURT: All right, we will poll the jury.

(Jury repolled; all answer in the affirmative.)

THE CLERK: Jury polled, your Honor.

THE COURT: Anything further? If not, thank you very much.

375—Affidavit of Service United States Court of Appeals
For the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Jose Fernandez
Plaintiff
against
Chios Shipping Co. Ltd.,
Defendant and Third Party Plaintiff-Appellee
against
Maher Stevedoring Company Inc., and States Marine Lines Inc.,
Third-Party Defendants-Appellants
Chios Shipping Co. Inc.,
Fourth Party Plaintiff-Appellee
against
Castle & Cook, Inc., Dole Corp. and Castle & Cook Foods Corporation
Fourth Party Defendants-Appellants
On Appeal from The United States District Court for the Southern District of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:
Raymond J. Braddick, agent for Defendants-Appellants being duly sworn,

deposes and says that he is over the age of 21 years and resides at
Levittown, ~~Levittown~~ New York
That on the 15th/ day of April , 1975 6
he served the annexed Joint Appendix upon

1. McHugh Heckman Smith & Leonard
Attorneys for Third Party Defendant-Appellant
Maher Stevedorint Inc.,
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Hew York, New York

2. Boal Doti & Larsen Esqs.
Attorney for Third Party Defendant-Appellamt
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3. Fogarty & Wynne Esqs.
Attorney for Fouth Party Defendants-Appe lants
Castle & Cook Inc., Dole Corp. amd Castle & Cook Foofs.
99 John Street
New York, ~~New York~~ York

4. Zock, Petrie Reid & Curtin Esqs.
Attorney for Third Patyu Plainti f-Appellant
19 rector Street
New York, New York

in this action, by delivering to and leaving with said attorneys
three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 15th.
day of MApril, 1976

Raymond J. Braddick

Robert W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977